UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
APR - 7 2017
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STEVEN H. HALL
7141 CHESAPEAKE VILLAGE BLVD
CHESAPEAKE BEACH, MARYLAND 20732
***Petitioner*,**

vs. Case No. 17-1113

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION (EEOC)
***Respondent*,**

PETITION FOR REVIEW ORDER OF EEOC

Notice is hereby given this the 7th day of April, 2017 that Petitioner, Steven H. Hall, hereby petition the United States Court of Appeals for the District of Columbia Circuit for review of the Decision and Order of the Respondent Equal Employment Opportunity Commission (EEOC) in Appeal No. 0120140975, Hearing No. 570-2013-00245X, and Agency No. HS-HQ-22253-2012.

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ORIGINAL

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***Petitioner*,**

vs. Case No. 17-1113

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)
***Respondent*,**

ORIGINAL

PETITION FOR REVIEW

Pursuant to 29 C.F.R. 1614.405(c) and 1614.109(e)(3)(g). The appellate in its discretion did not grant Petitioner a hearing and clearly made an erroneous interpretation of material fact or law. The appellate decision would not have made a substantial impact on the policies, practices, or operations of the Agency. The Equal Employment Opportunity Commission (EEOC) Administrative Judge (AJ) erroneously interpreted this "Mixed EEO case" by not granting Petitioner a hearing, but made a decision on MINOR issues to include a request for teleworking, Project Management course, imposed expectations, demeaning and demanding tones, upgraded job position, management-directed reassignment, and a closeout performance appraisal. The EEOC AJ did not acknowledge the MAJOR issues to include hostility towards Petitioner, false allegation of sexual harassment (SH) complaint, tainted SH investigation, sex discrimination, mismanagement, denied an opportunity to listen to an alleged sexual-laced voice message and denied career development to include Training Instructor/Coordinator positions. Petitioner was reassigned in a noxious (dusty) working environment and forced to remain in an unsettled/hostile working relationship (HWR) and hostile working environment (HWE) with Ms. Lisa Quiveors, a former female co-worker. ROI 00152. The unsettled/HWR started when Dr. P directed the Petitioner to monitor the whereabouts of Quivoers and this prompted Quiveors to file a false allegation of SH. ROI 00118-00119.

COMPLAINANT RESPONSE TO THE AGENCY'S MOTION FOR A DECISION WITHOUT A HEARING

I. ISSUES.

The Agency and EEOC AJ did not mention the fact that Dr. Teresa Pohlman (Dr. P) created and condoned an HWE by contacting the Personnel Security Office to remove Petitioner from workplace on March 1, 2012. See ROI 00152, 00194-00195. Dr. P opened her office door so other OCAO employees could witness the heated conversation between her and Petitioner and stated that she was contacting security. Dr. P stated; "*I chose to monitor the situation*" but the damage was done. ROI 00159-00161 #9. On March 13, 2012, Ms. Lisa Quiveors met with Dr. P and this enhanced the already HWR and HWE by discussing and deciding that SH was committed by the Petitioner in the workplace of OCAO. ROI 00315.

II. FACTS.

Dr. P created and condoned an HWE and stated to the Petitioner; "good workers are hard to fine." ROI 00194-00195, 00102 #48. On March 15, 2012, the Petitioner was informed that Ms. Quiveors filed a SH complaint against him. ROI 00026. The Agency and Quiveors used an alleged sexual-laced voice message to find the Petitioner guilty of SH. Ms. Quiveors allegations of SH were false based on the fact that she waited five months to build a case against the Petitioner. The AJ did not grant a hearing, nor allow Petitioner to listen to the alleged voice message. ROI 00313-00315. The Agency admitted that there was many "sides to the story" and stated quote; "there were several issues at hand, that seemed to cloud the inquiry." ROI 00369, 00285. The Agency denied Petitioner career development pending the outcome of a SH investigation. ROI 00373. The Agency forced upon Petition a reassignment to a noxious (dusty) working environment to rinse and wipe down golf carts was a significantly different responsibilities. Dr. P was not concerned about Petitioner career. ROI 00271.

III. LEGAL STANDARD.

The AJ improperly determined that there was no genuine of material fact in this case. 29 C.F.R. 1614.109(e)(3). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) . There was a false allegation of SH, tainted SH investigation, Petitioner denied career development opportunities. The Agency forced the Petitioner to work in an unsettled/HWR and remain in an HWE. A fact is "material" if it has the potential to affect the outcome of the case. See Attachment 1, pp 6-8.

IV. ARGUMENT.

The jury must review all the evidence and draw all reasonable inferences from the evidence in the light most favorable to the non-moving party. EEOC v. UPS, Inc., 249 F. 3rd 557 (6th Circ. 2001). The Petitioner attorney has explained and proved a prima facie of discrimination and retaliation. The Petitioner attorney did not state the fact that Agency employees tainted a SH investigation, Petitioner was a victim of a false allegation of SH, Petitioner was denied career development, and forced to work in an unsettled/HWR and remain in an HWE. See Attachment 1, pp 8-21. Ms. Quiveors filed a false allegation of SH complaint against the Petitioner without providing evidence. See Attachment 4 and ROI 00026. The AJ showed favoritism for the Agency by allowing obstruction of justice to withhold and conceal vital evidence/information and perjury.

V. CONCLUSION.

The Petitioner endured Tangible Employment Actions regarding Harassment and Discrimination by the Agency. All that is necessary to permit the case to proceed to a hearing is evidence sufficient to raise an issue of fact as to whether the Agency's proffered reason for Petitioner's treatment was pretext. See Tomka v. Seiler Corp., 66 F. 3rd 1295, 1309 (2d Cir. 1995). See Attachment 1, p 21. The Petitioner provided this Court and the Respondent additional evidence that was not previously stated in this case. The Petitioner evidence changed the outcome and determined a genuine of material fact and a hearing. 29 C.F.R. 1614.109(e)(3) and set forth in Rule 56 of the Federal Rules of Civil Procedures. Read Attachment 1.

AGENCY'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR DECISION WITHIOUT A HEARING

STATEMENT OF THE ISSUES

On November 12, 2013, the Agency issued Petitioner a motion without a hearing. The reply is based on MINOR issues that would not survive summary judgment. See Attachment 2.

STATEMENT OF UNDISPUTED MATERIAL FACTS

The Agency's response to Motion for a Decision Without a Hearing ("Response") regarding Nos. 7, 8, 10, 13, 14, 15, 17, 18, 25, 26, 27, 28, 33, 39, and 41. The disputed material facts does preclude summary judgment in this case. The Petitioner has provided factual evidence that affected the outcome of this case. Couture v. Social Security Administration, EEOC Doc 01A11327, 2011 WL 991794 (August 27, 2001); Celotex v. Catrett, 47 U.S. 317, 322-23 (1986). Assuming *arguendo* the facts as stated in Agency response, summary judgment was not appropriate in this case. See Attachment 2, pp 1-3.

DISCUSSION

A. Prima Facie Case.

The Petitioner alleged protected activity was based on a protected category regarding MAJOR issues that would survive summary judgment. It was irrelevant whether Quiveors was aware of all prior protected activity even though she was not the Petitioner's supervisor, but a co-worker. ROI 00304. The Petitioner's intent was not to compare himself to other employees under Dr. P's supervision, but to expose retaliation, unsettled/HWR in a HWE, false allegation of SH. The Agency response was MINOR issues to include teleworking, job duties, and position upgrades that would not survive summary judgment. See Attachment 2, pp 3-5.

B. Agency has Legitimate Non-Discriminatory Reasons and Complainant Cannot Establish Pretext.

The Petitioner consistently demonstrated sufficient facts to show that the Agency's legitimate, non-discriminatory reasons were more likely a pretext for discriminatory animus for reprisal discrimination. See Attachments 1 and 4 in its entirety. The Petitioner provided evidence to establish the Agency's conduct was based on retaliation, tainted SH investigation, and denied Petitioner career development, unsettled/HWR, and the Petitioner was forced to remain in an HWE that led to a false allegation of SH against him. Read Attachment 2, p5.

ORDER ENTERING JUDGMENT (OEJ) DESCISION

On November 21, 2013, the AJ issued Petitioner an OEJ pursuant to 29 C.F.R. 1614.109(g) (2013). Attachment 3, p3. The Agency discriminated against Petitioner regarding retaliation, tainted SH investigation, denied career development, and forced to work in an unsettled/HWR and in an HWE that led to a false allegation of SH. The OEJ does not mention that Quiveors illegally used an recorded alleged sexual-laced voice message to deceive the Agency that the Petitioner inappropriately and sexually harassed her. The Agency believed Quiveors deception and lies without obtaining factual evidence. On or about March 13, 2012, Dr. P and Quiveors met in a meeting to discuss and decide that the Petitioner had inappropriately and sexually harassed Quiveors. This was retaliation by Dr. P because the Petitioner had informed Ms. Prystal, Employee Relations that Dr. P mismanaged his career, forced him to remain in an unsettled/HWR in an HWE. Under that approach, if a plaintiff makes a prima facie case of unlawful retaliation, then the employer must produce a legitimate, nondiscriminatory reason for the employment action. See *Culton v. Mo. Dep't of Corrections*, 515 F.3d 828, 830 (8th Cir.2008). In addition, *Gilooly v. Mo. Dep't of Health and Senior Servs.*, 421 F.3d 740 (8th Cir. 2005) states; ultimately held that summary judgment was inappropriate on the facts presented there, because the employer's disbelief in the employee was "founded solely on the statements of other employees and witnesses," id. at 740, rather than on "independently verifiable evidence" or "independent corroboration from neutral non-parties."

The jury must decide whether the employer took the adverse action because of a good faith belief that the employee made false accusations (in which case there is no liability, see *EEOC v. Total Sys. Servs., Inc.,* 221 F.3d 1171, 1176 (11th Cir.2000)), or because the employee opposed unlawful activity (in which case the employer's conduct would violate Title VII or the MHRA).

CLAIMS.

The Petitioner was discriminated against and subjected to a continued HWR and HWE that was created and condoned by Dr. P and Quiveors. Dr. P diverted the attention from herself regarding retaliation and mismanagement of the Petitioner's career development. Dr. P conceal that Quiveors was building a false SH complaint against Petitioner from October 2012 to March 2013. Attachment 3, pp 4-5. The Agency's claims against Petitioner were retaliation and lies.

FACTS.

The Agency facts 1-7, 9-21, 23-31, and 33 were factual, but irrelevant. Fact 10 is factual, the Petitioner did use a cuss word, but it was never mentioned that Dr. P used a cuss word that prompted Petitioner. Dr. P created a HWE by contacting the Personnel Security Office. Fact 30 is factual, Dr. P was the supervisor for the Petitioner and Quiveors. It was a conflict of interest for Dr. P to be involved and issue Petitioner a Letter of Counseling and Management Directed Reassignment Letter. Fact 8 is not true, a Telework Policy did not exist in OCAO. Fact 22 is not true, the Petitioner did not engaged in inappropriate behavior (IB) and sexual misconduct. The Petitioner was not given an opportunity to listen to the alleged voicemail message. Fact 32 is not true, the Assets Management Group (AMG) Administrative Specialist applied for another job position and departed OCAO, thus leaving a open job position in

October 2012. OCAO took into consideration the results of a tainted SH investigation by refusing to discipline Quiveors for filing a false SH complaint. See Attachment 3, pp 5-9.

STANDARDS FOR DECISION WITHOUT A HEARING

Summary judgment was not appropriate based on the fact that the pleadings answers to interrogatories, admissions, affidavits and other evidence established a genuine issue as to any material fact, and the moving party is entitled to judgment by hearing as a matter of law. See 29 C.F.R. 1614.109(g) and Federal Rule of Civil Procedure, Rule 56. Federal Rule of Civil Procedure, Rule 56(e) is biased in this case based on the fact that the Petitioner's MAJOR issues were ignored by the AJ and would have survived summary judgment. The AJ found that the investigative record had been adequately developed, but fail to determine that Petitioner's MAJOR issues were not adequately developed or acknowledged. See Attachment 3, p 10.

ANALYSIS

The Petitioner was not attempting to demonstrate that he was treated less favorable than a similarly situated employee outside his protected group. The Petitioner's intent was not to compare himself to other employees under Dr. P's supervision, but to expose retaliation, unsettled/HWR in a HWE , and a false allegation of SH. The Agency response was based on MINOR issues to include teleworking, job duties, and position upgrades that would not survive summary judgment. See Attachment 2, pp 3-5. The Petitioner attorney explained and proved prima facie of discrimination and retaliation. The Petitioner attorney did not state the fact that Agency employees tainted a SH investigation, Petitioner was a victim of a false allegation of SH, Petitioner was denied career development, and forced to work in an unsettled/HWR and remain in an HWE. The Petitioner established *prima facie* and provided factual evidence that affected the outcome of this case regarding MAJOR issues stated in this case. Couture v. Social Security Administration, EEOC Doc 01A11327, 2011 WL 991794 (August 27, 2001); Celotex v. Catrett, 47 U.S. 317, 322-23 (1986). The Agency fail to articulate legitimate, nondiscriminatory reasons for its actions against the Petitioner. See Attachment 1, pp 8-21.

The AJ erroneously interpreted in this case by not granting Petitioner a hearing, but made a decision on MINOR issues to include a request for teleworking, Project Management course, imposed expectations, demeaning and demanding tones, job position upgrade, management-directed reassignment, and a closeout performance appraisal. The AJ did not acknowledge Petitioner's MAJOR issues to include unsettled/HWR and HWE, false allegation of SH complaint, tainted sexual harassment (SH) investigation, sex discrimination, mismanagement, denied an opportunity to listen to an alleged sexual-laced voice message and career and training development opportunities to include Training Instructor/Coordinator positions, reassignment was a noxious (dusty) working environment, and neglected that the Petitioner was forced to remain in an HWR with a former female co-worker and in an HWE. See Attachment 3, pp 10-13. The Agency issued Petitioner a Letter of Counseling and Management Directed Letter as punishment due to a tainted SH investigation regarding IB and SH. ROI 00341-00345. The Petitioner's first-line supervisor (Dr. P) and Quiveors discussed and decided that the Petitioner inappropriately and sexually harassed Quiveors before the Petitioner learn that a SH complaint was filed against him. The AJ falsely accuse the Petitioner of stating; "*sounded like she was under the bed*." Dr. P lied to the investigator to justify having the Petitioner removed from her division. ROI 00173 #57. There is no voice message or evidence that the Petitioner made this false statement. The AJ was biased towards the Petitioner. The Petitioner was detailed to the U.S. Coast Guard for 4-8 weeks. Afterwards, the Agency permanently reassigned the Petitioner to the St. Elizabeth's construction site as punishment in hopes of the Petitioner initiating a constructive discharge. The Petitioner was not able to perform his duties and responsibilities based on the fact that there was not a Local Area Network connectivity to the internet/intranet. Dr. P was dishonest by stating; "Complainant stated that he did not want "to go back to OCAO.." ROI 00234. The Petitioner did not have an issue returning to OCAO, but did not want to work directly for Dr. P. The Agency ultimate reasons for reassigning Petitioner was based on Quiveors false allegation of SH and the Agency's IB inquiry and SH investigation and not the organizational priorities and management's discretion. The AMG Administrative Specialist (Admin Spec) applied for another job position and departed OCAO leaving an open job position in OCAO. The Agency was dishonest and fail to articulate legitimate, nondiscriminatory reasons for its actions. There was a genuine disputes and the Petitioner presented substantive evidence to refute the Agency's articulations. The AJ incorrectly concluded that the record is devoid of any evidence that the Agency's actions were based on discriminatory animus. The AJ falsely stated that the Petitioner fail to present sufficient evidence to show that he was subjected to an HWE and has presented insufficient evidence to support an inference of a causal link between the alleged incidents and his protected bases, and the limited evidence presented falls far short of establishing a HWE. The AJ incorrectly asserted that the alleged conduct cannot be considered sufficiently severe and pervasive to have altered the conditions of the Petitioner's work environment. See Meritor, 477 U.S. at 67. AJ fail to acknowledge that the Petitioner was forced to remain in an HWR and HWE in OCAO.

DECISION

There was no absence of any evidence indicating that the Agency's actions were not discriminatorily motivated. The AJ neglected the fact that MAJOR issues were factual evidence that created a genuine issue of material fact. Petitioner was denied a hearing that would have survived summary judgment and resolve this case. See Attachment 3, pp 14-20.

PETITIONER'S APPEAL TO EEOC

On October 27, 2016, the Petitioner appealed EEOC decision regarding retaliation and prohibited personnel practices that existed in the Agency. The Agency collaborated in obstruction of justice to withhold and conceal vital evidence by not requiring Mary Prystal and Irene Cutitta who were co-workers to testify regarding a HWR, HWE, and tainted SH investigation. See Attachment 4, p 5 and read Attachment 4 in its entirety.

PETITIONER'S ARGUMENT

The Petitioner provides this Court and the Respondent discriminatory evidence that determines the summary judgment decision was a biased decision and an appropriate hearing would have resolved this case. Before the alleged SH complaint, the Petitioner was denied a detail and reassignment under HSRP regarding training job positions in the Agency Training Department. ROI 00373-00375. The Petitioner was a Master Training Specialist (MTS) in the United States Navy before retiring after 24 years and he affirms that his career would have excelled in a new training job position. ROI 00129, 00103 #56. The AJ did not hold the

Agency accountable for denying Petitioner career development. The Petitioner was directed by Dr. P to call Quiveors at home and leave voice messages requesting her whereabouts. The Petitioner was forced to work with Quiveors in an unsettled/HWR and forced to remain in an HWE. The HWR became so severe and pervasive that Quiveors filed a false SH complaint against the Petitioner. The AJ overlooked slander and defamation of character and fail to acknowledge that Quiveors was coerced by Dr. P to file false allegations of SH against the Petitioner on or about March 13, 2012. The AJ fail to acknowledge that the Petitioner endured retaliation, false allegation of SH, tainted SH investigation, sex discrimination, slander and defamation of character. The AJ avoided case facts by eliminating critical evidence to protect the Agency and Quiveors. The AJ did not unequivocally state that IB/SH existed or did not existed in the workplace. The AJ was aware that the Agency required the Petitioner, an Admin Spec to rinse and wipe down golf carts in outdoors Summer temperatures greater than 85 degrees on a daily basis in the month of August 2012. The hostile treatment by Agency supervisors negatively affected the Petitioner's health to include diabetes, sleep apnea, and reactive airway disease. ROI 00104 #58. The Office of Workers' Compensation Programs paid the Petitioner almost $30K in benefits due to the noxious (dusty) working environment at St. E's. On or about November 15, 2013, the AJ did not provide fair due process when it was known to her that the Petitioner was being terminated from Federal service on November 18, 2013. The Petitioner provided sufficient facts to show that the Agency's legitimate, non-discriminatory reasons were more likely a pretext for discriminatory animus regarding reprisal and disability discrimination. The Petitioner attorney explained and proved prima facie of discrimination and retaliation. The AJ improperly determined that there was no genuine of material fact in this case. 29 C.F.R. 1614.109(e)(3). The AJ did not hold the Agency accountable for Tangible Employment Actions; discrimination and harassment. The discrimination constituted a significant change in employment by reassigning Petitioner in significantly different duties and responsibilities. The harassment negatively impacted the Petitioner's career and training development for which was mismanaged due to retaliation by Dr. P. The Petitioner has established *prima facie* and provided factual evidence that affected the outcome of this case. In addition, Dr. P intimidated the Petitioner by contacting Personnel Security Office to remove him from the workplace. From October 2012 to February 2013, Ms. Quiveors never made claims of SH until five months later on or about March 13, 2013. Ms. Quiveors claims were false allegations of SH. A board specifically found that Richey "knowingly made false complaints and allegations against Ms. Knott". See *Richey v. City of Independence; Debra Craig,* U.S. Court of Appeals, Eight Circuit, No. 07-2109. In addition, but the court also said that a plaintiff cannot "file false charges, lie to an investigator, and possibly defame co-employees, without suffering repercussions simply because the investigation was about sexual harassment." *Gilooly v. Mo. Dep't of Health and Senior Servs.*, 421 F.3d 734 and 740 (8th Cir. 2005). Like Richey, Quiveors file a false allegation of SH complaint against Petitioner and lied to IB inquiry and SH investigators. Quiveors asserted to DHS Management that the Petitioner inappropriately and sexually spoke to and touched her hair. See ROI 00371. Petitioner denied all allegations. The Agency proffered (rejected) reasons in this case that Quiveors violated personnel policies that resulted in the Petitioner being denied career development, falsely accused of IB/SH, and reassigned to a noxious (dusty) working environment. The AJ granted summary judgment de novo, granting the Agency and Quiveors all reasonable inferences without resorting to case facts and the Petitioner's personal knowledge and experiences in an HWR and HWE. Quiveors has a history of lying on other former male co-workers. See ROI 00315. Quiveors presented insufficient evidence that the Respondent finding should have found that Quivoers violated the policies regarding false complaints and intimidating or abusing Petitioner was a pretext for unlawful discrimination. Under Federal Rule of Civil Procedures 52(a) states "the finding of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the creditability of the witness." *Anderson v. Bessemer City, (1985).* Also see, *Pullman-Standard v. Swint, 456 U.S. 273 (1982)*, the Court of Appeals for the Fourth Circuit concluded that there was clear error in a District Court's finding of discrimination and reversed. The Petitioner met the criteria set forth in Title VII of the Civil Rights Act of 1964. The AJ ultimate decision was biased and based on inaccurate and MINOR issues that were not genuine material facts of law that would not survive a summary judgment.

REQUEST FOR RELIEF

For the above reasons, the Petitioner respectfully request that this Court remand this case back to EEOC for an appropriate hearing. The Petitioner Attachments 1 through 4 supports a hearing before a different AJ.

Respectfully submitted,

STEVEN H. HALL

CERTIFICATE OF SERVICE

I certify that on April 7, 2017, has provided this Court and the Defendant's a copy of this appeal and a copy of this appeal was uploaded in the Court's ECF system as follows:

United States Court of Appeals
for the District of Columbia Circuit
E. Barrett Prettyman U. S. Courthouse, Room 5523
333 Constitution Avenue, N. W., Washington, DC 20001

April 7, 2017
(Date)

STEVEN H. HALL
Petitioner/Pro Se

UNITED STATES
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE

STEVEN H. HALL, **Complainant,** **v.** **SECRETARY, DEPARTMENT OF HOMELAND SECURITY,** **Agency.**	)	**EEOC DOCKET NUMBER** 570-2013-00245X **Agency No.** HS-HQ-22253-2012 **Frances del Toro** **Administrative Judge** **DATE: November 5, 2013**

COMPLAINANT'S RESPONSE TO THE AGENCY'S MOTION FOR A DECISION WITHOUT A HEARING

Comes now the Complainant, Steven H. Hall, by and through the undersigned counsel, and respectfully responds to the Agency's Motion for a Decision without a Hearing. The Complainant asserts that this Motion should be denied on the merits because it raises disputed issues of material fact, which require a hearing.

I. ISSUES.

Was the U.S. Department of Homeland Security ("DHS", hereinafter referred to as "the Agency") discriminated against the Complainant and subjected him to a continuing hostile work environment on the bases of his race (African American, color (black), sex (male) and reprisal (raised concern of discrimination on March 1, 2012) consisting of the following discriminatory incidents:

1. From March 2011 through March 2012, the Occupational Safety and Environmental Programs Director, Dr. Teresa Pohlman, denied the Complainant's request to telework.

Attachment (1)

2. Since August 2011, Dr. Pohlman has denied the Complainant developmental opportunities, including discouraging him from applying for a one-day Project Management course.

3. From October 2011 to the present, Dr. Pohlman has imposed expectations/requirements on the Complainant that are inappropriate to his position and grade, namely:

   a. On a continuing basis since October 2011, Dr. Pohlman has required the Complainant to: manage higher-graded professionals; monitor the status of weekly reports for which Program Analyst Lisa Quiveors, has overall responsibility; press Ms. Quiveors to provide overdue reports; and micromage her and monitor her whereabouts.

   b. On January 3, 2012, the Complainant learned from an Administrative Officer, Kathy Quandahl that the Complainant's request for an upgrade to GS-13 was denied.

4. Since about November 17, 2011, Dr. Pohlman has failed to address Ms. Quiveors' hostility toward the Complainant despite having raised concerns on several occasions.

5. On February 15, 2012, Dr. Pohlman spoke to the Complainant in a demeaning, impatient and demanding tone.

6. On April 3, 2012, Dr. Pohlman denied the Complainant's request to be detailed to a Training Instructor/Coordinator position in the Chief Human Capital Office.

7. On May 24, 2012, Dr. Pohlman issued the Complainant a Letter of Counseling for inappropriate behavior towards Ms. Quiveors.

8. On May 24, 2012, Dr. Pohlman issued the Complainant a Notice of Management Directed Reassignment, effective June 3, 2012.

9. On May 29, 2012, Dr. Pohlman did not provide the Complainant with a closeout Performance Appraisal, which was important for the Complainant's pay increase. (Record of Investigation, hereinafter referred to as "ROI", p. 00067).

Attachment(1)

II. FACTS

The Complainant disputes the following facts in the section marked "Statement of Undisputed Material Facts", including Nos. 7, 8, 10, 11, 13, 14, 15, 17, 18, 25, 26, 27, 28, 33, 38, 39 and 41. The Complainant herein states the facts below as follows:

1. Complainant is an African American male who has engaged in prior EEO activity. (ROI, p. 00085).
2. From August 2, 2010 through May 29, 2012, the Complainant was an Administrative Assistant to the Occupational Safety and Environmental Program (OSEP) for the Agency. (ROI, p. 00084).
3. During the events addressed in the instant case, the Complainant's direct supervisor was Dr. Teresa Pohlman, Director of the Occupational Safety and Environmental Programs. (ROI, p. 00085).
4. The Complainant testified that the persons responsible for harassing him were Dr. Pohlman and Ms. Lisa Quiveors, a Program Analyst and co-worker. (ROI, p. 00086).
5. In August 2010, when the Complainant was hired at the Agency, he was informed that a telework option might be available to Administrative Assistants in early 2011. (ROI, p.00027).
6. In March 2011, the Complainant inquired about telework options and was informed that it was still not available to Administrative Assistants. (ROI, p.00086)
7. The Complainant requested telework options from March 2011 through and including March 2012, and was denied each time. (ROI, p.00027, p. 00086).

Attachment (1)

8. All the Administrative Assistants that were denied telework opportunities were African-American. (ROI, p. 0087).

9. In August 2011, the Complainant was denied the opportunity to apply for a 1-day funded Project Management course because Dr. Pohlman volunteered the Complainant to be a CFC Keyperson instead. (ROI, p. 00029).

10. Shortly after Ms. Quiveors began working for OSEP, the Complainant's duty of completing the weekly activity report was reassigned to Ms. Quiveors. (ROI, p. 00098).

11. Additionally, Dr. Pohlman ceased having weekly meetings with the Complainant, and instead held weekly meetings with Ms. Quiveors. (ROI, p. 00098).

12. Ms. Quiveors began asking the Complainant about his duties and began emailing him as if she was his superior. (ROI, p. 00098).

13. In October 2011, the Complainant complained about being discriminated against and mistreated by Dr. Pohlman. (ROI, p. 00093).

14. As a result, Ms. Mary Prystal, Chief Human Capital Office Employee Relations Specialist held a 2 ½ hour meeting with the Complainant and Dr. Pohlman on October 18, 2011, regarding the mistreatment of the Complainant by Dr. Pohlman and Ms. Quiveors. (ROI, p. 00093, p. 000101).

15. In November 2011, another meeting was held regarding the unsettled working relationship between the Complainant and Ms. Quiveors. (ROI, p. 00093).

16. Dr. Pohlman did not respond to the Complainant's allegations that Ms. Quiveors was treating him in a hostile manner except to say, "Ms. Quiveors is a little stressed out like everyone else." (ROI, p. 00099).

Attachment (1)

17. On February 15, 2012, Dr. Pohlman was disrespectful and demeaning to the Complainant when she demanded to know the whereabouts of Ms. Quiveors. (ROI, p.00092).
18. Dr. Pohlman would constantly press the Complainant to micro-manage Ms. Quiveors about the weekly activity report and about her whereabouts. (ROI, p. 00092).
19. Since Ms. Quiveors employment began, the Complainant's duties became increasingly similar to an Executive Assistant of Dr. Pohlman instead of an administrative assistant. Specifically, his duties resembled that of a GS13. (ROI, p. 00029).
20. In January 2012, the Complainant applied to upgrade to a GS13 based on the increase in his duties. (ROI, p.00094).
21. Dr. Pohlman forwarded his request for the upgrade to Ms. Quandahl, and she denied the upgrade via email within 3 minutes. (ROI, p.00094,00095).
22. Then, on February 29, 2012, the Complainant sent an email to Ms. Dana Crawford, Ms. Prystal's supervisor, indicating that he and five other African-American's were being discriminated against in their pursuit of telework options. (ROI, p. 00065). In that email, the Complainant also indicated that he still felt he was being mistreated by Dr. Pohlman and has strained their working relationship to an unrepairable extent. (ROI, p. 00065).
23. In response, Ms. Prystal responded the EEO process was available to him as a form of redress. (ROI, p. 00064). It should be noted that this email does not provide the Complainant with any notice of a deadline for filing a complaint with the EEO. (ROI, p. 00064).
24. On March 1, 2012, the Complainant met with Dr. Pohlman regarding the discrimination and hostile environment he was experiencing. (ROI, p.00026). The Complainant requested a detail assignment from Dr. Pohlman because he said he felt his career opportunities were not important to her, and that his career development was being limited. (ROI, p.00090).

Attachment (1)

25. On March 15, 2012, the Complainant learned that Ms. Quiveors filed a sexual harassment complaint against him. (ROI, p.00026).

26. On April 3, 2012, the Complainant formally requested detail to DHS Training department in a Training Coordinator GS 13/14 position. The Complainant's request for detail assignment was denied due to the pending sexual harassment investigation. (ROI, p. 00097).

27. On April 20, 2012, the investigation into the sexual harassment complaint was completed. (ROI, p. 00100).

28. The Complainant was forced to telework for an additional 34 days, and was then forced to be reassigned as a result of the sexual harassment complaint filed by Ms. Quiveors. (ROI, p. 00100).

29. On April 23, 2012, the Complainant contacted the EEO directly to commence the instant proceeding. (ROI, p.00094).

II. LEGAL STANDARD

The Commission's regulations allow an Administrative Judge (AJ) to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. Sec. 1614.109 (g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v.

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Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the "record has been adequately developed for summary disposition." See Petty v. Department of Defense, EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary.

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmond v. Warrener, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Pedersen v. Department of Justice, EEOC Request No. 05940339 (February 24, 1995). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims." Mi S. Bang v. United States Postal Service, EEOC Appeal No. 01961575 (March 26, 1998); See also Peavley v. United States Postal Service, EEOC Request No. 05950628 (October 31, 1996); Chronister v. United States Postal Service, EEOC Request No. 05940578 (April 23, 1995). The hearing process is intended to be an extension of the investigative process, designed to "ensure that the parties have a fair and reasonable opportunity to explain and supplement the record and to examine and cross-examine witnesses." See EEOC Management Directive (MD) 110, November 9, 1999, chapter 6, page 6-1; see also 29 C.F.R. Sec. 1614.109(d) and (e).

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When evaluating motions for summary judgment in the context of employment discrimination, the federal courts have "emphasized the importance of zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses." McGinest v. GTE Service Corp., 360 F.3d 1103, 1112 (9th Cir. 2004) (citations omitted); see also Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81-82 (1998) ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.").

III. ARGUMENT

The Commission must view the evidence and draw all reasonable inferences from the evidence in the light most favorable to the non-moving party. Equal Employment Opportunity Commission v. United Parcel Service, Inc., 249 F.3d 557 (6th Circ. 2001). In reviewing the evidence submitted by the Agency and by the Complainant, the Commission must view the evidence and draw its reasonable inferences in a light most favorable to the Complainant.

To prove a *prima facie* case of discrimination, the Complainant must show that (1) he is a member of a protected class; (2) he was subject to an adverse employment action; (3) he was qualified for her position; and (4) that he was treated less favorably than similarly situated non-protected employees. *Peltier v. United States*, 388 F.3d 984, 987 (6th Cir. 2004). In this matter, the Complainant has provided said evidence, and as such, has proven a *prima facie* case of discrimination.

To establish a *prima facie* case of reprisal or retaliation discrimination, the Complainant must demonstrate (1) that he previously engaged in protected activity, (2) that the agency was aware of the Complainant's activity, (3) that the Complainant was contemporaneously or subsequently subjected to adverse treatment by the agency, and (4) that a nexus exists between the protected activity and the adverse treatment. Mack v. Otis Elevator Co., 326 F.3d 116, 129 (2d Cir. 2003).

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A review of the Complainant's statement and supporting statements shows that the Complainant proved a *prima facie* case of hostile work environment. Specifically, in order to establish a *prima facie* case of hostile work environment based, the complainant must initially establish that, (1) he belongs to the relevant statutorily protected class; (2) he was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile or offensive work environment; and (5) there is a basis for imputing liability to the employer. *See Gonzalez v. Dep't of Air Force*, EEOC Appeal No. 01A31625 (July 8, 2004) (citing *McCleod v. Social Sec. Admin.*, EEOC Appeal No. 01963810 (Aug. 5, 1999)).

Harassment "is created when a reasonable person would find the work environment hostile or abusive." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993). Further, "[a]n appropriate review of the facts should include the frequency of the discriminatory conduct, its severity, whether physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance." Harris at 23.

A claim of harassment must be predicated on events that are sufficiently severe and pervasive such that the conditions of the workplace are altered, i.e., the harassment has culminated in a tangible employment action or created a hostile work environment, and it unreasonably interfered with an employee's work performance. See Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999). In assessing whether a Complainant has stated a claim of hostile work environment, the trier of fact must consider all of the alleged harassing incidents together in the light most favorable to the Complainant in order to determine whether they are sufficient to state a claim. Id.

In the record, the Complainant set out facts, which, if true, support his allegations that he was subject to discrimination based on his race, sex and reprisal, and experienced a hostile work environment at the

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hands of Dr. Pohlman. The Complainant has demonstrated that questions of facts exist which requires a hearing.

A. The Complainant can establish a *prima facie* case of discrimination based on reprisal.

Here, the Agency argues two points, first that the Complainant did not mention discrimination based on his race and/or gender any time prior to his EEO contact on April 23, 2012, and in support of that position, that the Complainant's communication on March 1, 2012 does not constitute protected activity. Additionally, the Agency asserts that the alleged actors were not aware of any protected activity, and that the Complainant was not subject to any adverse employment actions. The Complainant has provided evidence to the contrary and asserts that that there are substantial disputes of material facts regarding this claim that must be decided by a trier of fact.

First, the Complainant testified that as early as October 2011, he informed Rhonda Lovato that Dr. Pohlman was treating him unfairly. (ROI, p. 00093). In response, Ms. Mary Prystal, Chief Human Capital Office Employee Relations Specialist held a 2 ½ hour meeting with the Complainant and Dr. Pohlman on October 18, 2011, regarding the mistreatment of the Complainant by Dr. Pohlman and Ms. Quiveors. (ROI, p. 00093, p. 000101). In November 2011, another meeting was held regarding the unsettled working relationship between the Complainant and Ms. Quiveors. (ROI, p. 00093). Then, on February 29, 2012, the Complainant sent an email to Ms. Dana Crawford, Ms. Prystal's supervisor, indicating that he and five other African-American's were being discriminated against in their pursuit of telework options. (ROI, p. 00065). In that email, the Complainant also indicated that he still felt he was being mistreated by Dr. Pohlman and has strained their working relationship to an unrepairable extent. (ROI, p. 00065). In recognition of this email and of the Complainant's belief that he was being discriminated based on his race, the Complainant received a response from Ms. Prystal indicating that the EEO process was available to him as a form of redress. (ROI, p. 00064). It should be noted that this email does not provide the Complainant with any notice of a deadline for filing a complaint with the EEO. Further, while the Agency attempts to argue that

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the Complainant was claiming discrimination based on title, it should be clear that the Complainant has testified that all the Administrative Assistants he was referring to were all African-American and were all denied telework opportunities, and that the Complainant had informed Dr. Pohlman of the same. (ROI, p. 0087). Thus, the Complainant has proven that he had begun to engage in protected activity prior to his initial contact with the EEO on April 23, 2012. Further, the Complainant has also proven that alleged actors, Dr. Pohlman and Ms. Quiveors, were aware of his protected activity as early as October and November 2011.

Next, while the Agency argues that the Complainant has not suffered any adverse employment action, the Complainant, again has proven this inaccurate. The Agency argues that Complainant's claims that he was not upgraded to a higher position, was denied training opportunities or detail assignments, and was subject to a hostile work environment do not constitute adverse employment actions. However, the Complainant argues that all of these actions occurred after he tried to address his mistreatment via the appropriate avenues. Specifically, the Complainant asserts that after Dr. Pohlman was aware that he felt he was being mistreated and discriminated against, she responded by engaging in further hostile treatment of the Complainant, including failing to address the hostility between the Complainant and Ms. Quiveors, and instead encouraging more contact between the two. (ROI, p.00099). In addition, in January 2012, after the November 2011 meetings regarding the Complainant's mistreatment, the Complainant requested an upgrade to a GS13 via email to Dr. Pohlman and her response was to "simply forwarded [his] email request to Kathy Quandahl and in minutes [his] request for processing an upgrade to a GS13 position was denied without justification." (ROI, p. 00094). The Complainant further testified that Dr. Pohlman was a Senior Executive Service who had authority to assist him with an upgrade, and yet she forwarded his request to Ms. Quandahl, who was a non-decision maker in the process regarding GS-13 pay grades. (ROI, p. 00094). Additionally, the Complainant testified that on March 1, 2012, after he had raised specific discrimination concerns, he was denied a training opportunity when DR. Pohlman told him she needed him in the office as

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the CFC Key Person which would conflict with his training, while others were allowed to attend. (ROI, p. 00089). And, finally, as a result of Dr. Pohlman's refusal to address or repair the ongoing hostile relationship between Ms. Quiveors and the Complainant, Ms. Quiveors ended up filing a complaint against the Complainant falsely accusing him of sexual harassment. (ROI, p. 00089). This complaint derailed the Complainant's career to such an extent that it has been unrecoverable to date, including the loss of ability to apply for detail assignments for which the Complainant was clearly qualified, the denial in a pay increase, etc. (ROI, p. 00089). Thus, the Complainant has clearly shown that he suffered adverse employment actions.

And, finally, the Complainant has shown the nexis between the protected activity and the treatment, which resulted. Specifically, while the Complainant continued to assert that he was being discriminated against and mistreated, the hostile relationship between himself and Dr. Pohlman and Ms. Quiveors worsened. And, as a result, Ms. Quiveors alleged harassment by the Complainant which significantly impacting his career potential. As such, the Complainant has proven a *prima facie* case of reprisal discrimination.

B. The Complainant can establish a prima facie case of discrimination based on his race (African American) and sex (male).

Here, the Agency argues the Complainant cannot prove discrimination based on sex and race as the Complainant cannot identify comparators. However, the Complainant disputes this assertion and argues the Agency's limited window for identifying comparators is inaccurate.

The Complainant has proven that he is a member of a protected class, and as discussed above, that he was subject to adverse employment actions. The Complainant has further shown that he was qualified for his position, and that he was treated less favorably than similarly situated non-protected employees. Specifically, the Complainant's argument is two-fold.

First, the Complainant's argument he was continually denied telework opportunities as a result of racial discrimination is valid. Specifically, while the Agency argues that it was a job title distinction, the

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Agency dismisses the fact of the matter that all the Administrative Assistants who were denied telework opportunities were all African-American. (ROI, p. 0087). And, the Complainant further asserts that while the Agency, including Dr. Pohlman, tried to assert there was no discrimination because AA's simply were not permitted to telework, the Agency simply cannot reconcile this position as Mr. Dan Wilson, Chief of Staff for OCAO, testified that "[t]here is no separate Telework Policy for Administrative Specialists." (ROI, p. 00276). Thus, the Agency's reliance on the Administrative Assistant discrimination versus African American discrimination argument fails. Additionally, the Complainant testified about other instances in which he, as an African American, was treated differently than other similarly situated individuals. Specifically, the Complainant testified that, "Kathy Quandahl who was the Administrative Officer/HR Representative constantly requested that we (AAs) complete and provide Individual Development Plans (IDPs) to Directors. The Front Officer only allowed me and the other AAs one opportunity to attend funded training/course in the past two years.....because [the Complainant] and other AAs were consistently discouraged from requested training." (ROI, p. 00091). In this statement, the Complainant again is referencing the AA's which were solely African American.

The Complainant further testified that, "[t]here were 11 other employees besides me within OSEP. OSEP Director was Dr. Pohlman, Caucasian. Environmental was Pete Wixted, Caucasian, Dawn Gunning, Caucasian, Dennis McMenamin, Caucasian. Environmental Planning & Historic Preservation was David Reese, Caucasian, Lauren Shick, Caucasian, and Marie Ecton, African American. Energy was Steve White, Caucasian, Maria Britt, Caucasian, Patricia Harrington, Caucasian. OSEP Special Assistant was Lisa Quiveors a Program Analyst worked with all OSEP Groups. Dr. Pohlman considered training for these individuals as a higher priority and AA training and career development was not a concern." (ROI, p. 00091). Thus, while the Agency tries to limit the comparator group for the Complainant solely to AA's who reported to Dr. Pohlman, this would be an impossible group for which to find a comparator, as the Complainant was the sole AA who reported to Dr. Pohlman. Thus, widening the comparator group to show

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the other reports to Dr. Pohlman clearly gives a broader picture of the racial impact of Dr. Pohman's decisions and her favorable treatment of Caucasian employees versus African American employees, including the Complainant. The Complainant testified, "Dr. Pohlman looked at me as her personal assistant that supported her directly, whereas she did not ask other OSEP employees to do any additional duty because she felt it was beneath them to perform so called menial work outside of their job descriptions." (ROI, p. 00094). This clearly exemplifies the disparate treatment between the Complainant, the sole African American male report to Dr. Pohlman, and her other reports. Additionally, the Complainant testified that "[n]o African American AAs were upgraded in OSEP under Dr. Pohlman. Erika Eicholtz an African American female EA was promoted to Administrative Officer/HR Representative in the GS14 pay grade. Ms. Lovato, a Caucasian female was promoted from GS13 to GS14. Mr. Wilson made sure Ms. Eicholtz and Ms. Lovato were promoted because they worked directly for him." (ROI, p. 00096). Thus, it is clear by testimony that the Complainant has shown disparate treatment based on his race.

The second of the Complainant's arguments is that "he was the only African American male who worked for Dr. Pohlman and [he felt] that she singled [him] out from the African American females while treating all Caucasian and both African American female employees with respect." (ROI, p. 00088). An example of this is the continuous denial of the Complainant's request to telework, while other female reports were permitted to do the same. Specifically, even though Ms. Quiveors performed similar tasks to the Complainant, and even performed some of the tasks the Complainant had previously performed including the weekly activity reports, Ms. Quiveors testified that she was able to telework at least three days per week. (ROI, p.000305). And, the Complainant testified that, "[he], Ms. Quiveors and Ms. Ecton were the only African Americans working for Dr. Pohlman and she never asked any of the other co-workers to micro-manage Ms. Quiveors. She singled [him] out and tasked [him] to do this because [he] was the only African American male in the office." (ROI, p. 00094). Thus, it is clear that the Complainant, as a male, was treated differently than other similarly situated employees solely because of his sex.

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Thus, the Complainant has established a *prima facie* case of race and sex discrimination, and as such, the Agency's argument must fail.

C. The Complainant has shown the Agency's alleged legitimate, non-discriminatory reasons for its actions are merely pretext for discrimination.

Here, the Agency argues that for each specific allegation, they have a legitimate, non-discriminatory reason for their actions. However, the Complainant has shown that their actions are questionable, at best, and were motivated by discriminatory animus.

1. Telework

Here, the Agency argues *ad nauseum* that their legitimate, non-discriminatory reason for denying telework opportunities to the Complainant is because he was an Administrative Assistant and that all Administrative Assistants were denied telework. However, as mentioned previously, the Agency's argument is tainted and fails to address the factual matter that all the AA's denied telework opportunities were, in fact, African American. Additionally, the Agency argues continuously that based on the Complainant's supporting position, that telework could not work. However, the Complainant again provided evidence that Ms. Quiveors held a supporting position, which included similar, if not identical, work to the Complainant, and yet she was permitted to telework three days per week. (ROI, p.000305). Lastly, although the Agency references Dr. Pohlman's willingness to grant episodic telework opportunities, the Agency fails to report that when the Complainant was permitted to use episodic telework options, he had to use personal or sick leave for the same whereas others did not. (ROI, p. 00087). Thus, the Agency's argument that Dr. Pohlman's decision to deny the Complainant's telework request was anything other than discriminatory in nature must fail.

2. Development Opportunities

Here, the Agency argues relies on Dr. Pohlman's testimony that she supported developmental opportunities for the Complainant. However, the Complainant testified to the contrary. Specifically, outlined above is a description of the staff that reported to Dr. Pohlman, including the racial makeup of the

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same. The Complainant testified, "Dr. Pohlman considered training for these individuals as a higher priority and AA training and career development was not a concern." (ROI, p. 00091). As the sole male African American report to Dr. Pohlman, it is clear that she did not consider the Complainant's developmental opportunities, and had no problem sacrificing his opportunities for the advancement of her other Caucasian and/or female reports. As such, the discriminatory animus is evident.

3. Duties and Responsibilities

Here, the Agency argues that Dr. Pohlman did not have any expectations/requirements of the Complainant beyond his actual job description. The Agency also argues that with respect to the denial of upgrade to GS-13, that no other AA's were upgraded as they were already at the top of their position ladder, and to be considered for a higher grade, they would have needed to apply for the same. The Complainant disputes these arguments.

Specifically, the Complainant testified, "Dr. Pohlman looked at [him] as her personal assistant that supported her directly, whereas she did not ask other OSEP employees to do any additional duty because she felt it was beneath them to perform so called menial work outside of their job descriptions." (ROI, p. 00094). The Complainant further testified, "Dr. Pohlman directed me to manage and monitor her daily calendar while scheduling meeting, appointments, events and placing people on her calendar." (ROI, p. 00092). In addition, the Complainant was in charge of his regular duties, as well as monitoring other employees' duties, including their whereabouts. Basically, the Complainant was acting as Dr. Pohlman's EA, even though he was only being recognized as an AA.

Additionally, the Complainant testified that "Erika Eicholtz an African American female EA was promoted to Administrative Officer/HR Representative in the GS14 pay grade. Ms. Lovato, a Caucasian female was promoted from GS13 to GS14. Mr. Wilson made sure Ms. Eicholtz and Ms. Lovato were promoted because they worked directly for him." (ROI, p. 00096). Thus, the Agency's argument that the Complainant admitted no other EA's or AA's were upgraded during the time in question is inaccurate.

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Rather, the Complainant testified to the contrary, that another EA and AA were promoted, yet he was not. As such, it is clear Dr. Pohlman was exhibiting discriminatory animus.

As this is a fact that is heavily in dispute, it is clear that this is an issue to be determined by a trier of fact.

4. Concerns about Ms. Quiveors

Here, the Agency disputes the Complainant ever raised any concerns about the hostile treatment he endured from Ms. Quiveors, but only troubles with projects they were working on together. The Complainant whole-heartedly disagrees with this argument.

Rather, the Complainant asserts that Dr. Pohlman was on notice about Ms. Quiveors treatment of him from as early as October 2011. The Complainant further asserts that HR became involved in the escalating situation during a meeting with Ms. Mary Prystal, Chief Human Capital Office Employee Relations Specialist on October 18, 2011, regarding the mistreatment of the Complainant by Dr. Pohlman and Ms. Quiveors. (ROI, p. 00093, p. 000101). In November 2011, another meeting was held regarding the unsettled working relationship between the Complainant and Ms. Quiveors. (ROI, p. 00093). The Complainant further asserts that although Dr. Pohlman knew about the troubles between the Complainant and Ms. Quiveors, Dr. Pohlman encouraged more contact between the two of them, including contact that could have a devastating effect on the relationship wherein she requested the Complainant to check up on the whereabouts of Ms. Quiveors. Specifically, the Complainant testified, "Dr. Pohlman would ask me two or three times per week, whether [he] had seen Ms. Quiveors that day and direct [him] to locate Quiveors and find out what tasks she was working on……Dr. Pohlman used me as a go between her and Ms. Quiveors." (ROI, p. 00092). Essentially, Dr. Pohlman utilized the Complainant to micromanage Ms. Quiveors so she did not have to, and Ms. Quiveors began to resent the Complainant, thereby instilling an even more hostile relationship between her two reports whom already had a strained relationship. Thus, the Complainant wholly disputes there was no animus or malicious intent with respect to this issue.

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5. Demeaning Tone

Here, the Agency essentially invokes the he-said/she-said argument, and states because Dr. Pohlman was not demeaning to her other reports, that she, therefore, was not demeaning to the Complainant. However, February 15, 2012, was not the only time the Complainant asserted Dr. Pohlman was demeaning to him. Rather, the Complainant testified that Dr. Pohlman treated him in a demeaning manner. An example, the Complainant testified was how "Dr. Pohlman was aware that IT technicians checked in with their supervisors from 7:30 until 9 am, but she was never forgiving and illustrated her frustrations by speaking to [him] in a demeaning tone. Her harsh tone voice was noticed by other AAs who indicated that they would never want to work for her." (ROI, p. 00102). The Complainant specifically testified that he "felt in her position she had full control of [his] career and [he] didn't want to be the subject to any reprimand that would impact [his] performance appraisal and ultimately potential termination from the Federal government." (ROI, p. 00103). Therefore, this is clearly an issue to be determined by a trier of fact.

6. Request for Detail

Here, the Agency argues their legitimate reason for denying Complainant a detail assignment to a Training Instructor/Coordinator position in the Chief Human Capital Office was due to the pending sexual harassment investigation. However, the Agency fails to address the fact that by denying the Complainant the opportunity to even apply for said detail was treating him as guilty before the investigation was completed. Additionally, the Agency's denial of his opportunity to apply for the detail assumes the complaint was valid even though the Complainant has proven hostile motivations by Ms. Quiveors, for which Dr. Pohlman was aware and failed to address. Thus, the Complainant asserts the failure to permit the Complainant to apply for the detail was a complete result of discriminatory animus, and nothing more.

7. Letter of Counseling

Here, the Agency argues their legitimate, non-discriminatory reason for the Letter of Counseling provided Complainant was the result of the outcome of the sexual harassment investigation. Again, the

Complainant asserts that Dr. Pohlman's inability to resolve the conflict between himself and Ms. Quiveors was the motivating factor behind Ms. Quiveors filing of the complaint. The Complainant further asserts the complaint was fraudulent and any repercussions from the complaint are discriminatory by their very nature.

8. Reassignment

Here, the Agency argues their legitimate, non-discriminatory reasons for the Complainant's reassignment again stem from the results of the sexual harassment complaint by Ms. Quiveors. The Complainant again asserts that had Dr. Pohlman addressed the concerns he first asserted about Ms. Quiveors hostile treatment of him beginning in October 2011, the issues may have been resolved and would not have resulted in the Complainant being forced to be reassigned. Thus, Dr. Pohlman's failure to address the issues between the Complainant and Ms. Quiveors when the Complainant complained, but only when Ms. Quiveors complained, is entirely discriminatory. As such, the need for reassignment of the Complainant was motivated by discriminatory animus.

9. Closeout Performance Plan

Here, the Agency argues the Complainant was provided a close-out performance appraisal, and therefore no issue exists. However, the Agency fails to address the fact that the investigation into the sexual harassment complaint by Ms. Quiveors was over in April 2012, and the Complainant had to wait longer than a month after to receive notification of the results, his reassignment, and his permanent reassignment. In that time, the Complainant was denied the ability to apply for details for which he was qualified, and as a result lost the ability to increase his grade/salary. As such, the delay of the closeout performance plan caused even further discrimination of the Complainant. Since the pending investigation was completed, there was no other legitimate reason, other than discriminatory animus, to allow the Complainant to wait longer to resolve the matter. Thus, the Complainant disputes the Agency's legitimate reasons asserted.

D. The Complainant can establish a prima facie case for hostile work environment/harassment (non-sexual).

Here, the Agency argues that the Complainant cannot prove hostile work environment because the

Complainant failed to prove that any of the actions taken were as a result of his protected class and/or activity. The Agency also argues that none of the acts rise to the level of being severe or pervasive enough to cause a hostile work environment. The Complainant asserts the Agency is incorrect in their application.

First, the Complainant argues that all of the actions taken together are severe or pervasive enough to constitute harassment. Specifically, the Complainant began complaining that he was being discriminated against and mistreated as early as October 2011. In response, HR became involved and had a lengthy meeting on October 18, 2011 between themselves, the Complainant and Dr. Pohlman. As the issues remained unresolved and worsened with Ms. Quiveors, another meeting was held in November 2011, again regarding the mistreatment of the Complainant. And, as things had not been resolved and the Complainant was still being mistreated at the hands of Dr. Pohlmand and Ms. Quiveors, the Complainant again contacted HR regarding the discrimination he was enduring at the end of February 2012. Thus, although the Agency would have you believe the incidents the Complainant outlined were discrete and isolated, they, in fact, did not occur in a vacuum. Rather, they were part of a larger picture wherein the Complainant was treated disparately from other non-African American and female workers. He was treated disrespectfully through the duties he was assigned, the continual denial of his request to telework even though other support personnel were permitted to do the same, the manner to which he was spoken by Dr. Pohlman and Ms. Quiveors, the denial of any training/career enhancement opportunities and the manner in which the issues he raised remained unresolved as if of non-import.

The Complainant's testimony that, "[H]e was intimidated as a male African American because Dr. Pohlman was a female Caucasian SES. [H]e felt that in her position she had full control of [his] career." Thus, the Complainant clearly felt any actions contrary to Dr. Pohlman's position would be detrimental to his career, and the actions taken against the Complainant have proven this to be true. The Complainant suffered adverse employment actions so severe that his career has not recovered from Dr. Pohlman's treatment of him to date. Prior to being under Dr. Pohlman's report, and being forced to work with Ms.

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Quiveors, the Complainant received excellent Performance Appraisals. (ROI, p. 00238). Yet, after being improperly managed by Dr. Pohlman and subjected to ongoing discrimination and mistreatment by the same, the Complainant's career has been permanently tarnished. Thus, the Complainant has proven a prima facie case of harassment, and as such, the Agency's argument must fail.

IV. CONCLUSION

All that is necessary to permit the case to proceed to a hearing is evidence sufficient to raise an issue of fact as to whether the Agency's proffered reason for Complainant's treatment was pretext. See Tomka v. Seiler Corp., 66 F.3d 1295, 1309 (2d Cir.1995); Fisher v. Vassar College, 114 F.3d 1332, 1337-38 (2d Cir.1997) (en banc), cert. denied, 522 U.S. 1075, 118 S.Ct. 851, 139 L.Ed.2d 752 (1998). Because the intent of the Agency is a factually disputed matter, summary judgment should be precluded. See Tomka v. Seiler Corp., 66 F.3d 1295, 1309 (2d Cir.1995). Here, a question of fact clearly exists as to whether the Complainant was discriminated against based on his race and sex, suffered from a hostile work environment, and was subject to reprisal discrimination. Thus, the Complainant respectfully requests that the Commission does not dismiss the instant action without a hearing. For these reasons, judgment as a matter of law should not be granted.

Dated this the 5th day of November 2013.

Respectfully submitted,

s/a Victoria Williamson for

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CERTIFICATE OF SERVICE

I hereby certify that on this the 5th day of November 2013 the attached Motion was sent to the below addresses by the delivery method indicated:

Honorable Frances del Toro, Administrative Judge
Equal Employment Opportunity Commission
Washington Field Office
131 M Street, NE, Suite 4NW02F
Washington, DC 20507
Via email to frances.deltoro@eeoc.gov

Grace H. Lee
Attorney-Advisor
Office of the General Counsel
U.S. Department of Homeland Security
Washington, DC 20528
Via Email to Grace.Lee@HQ.DHS.GOV

Steven H. Hall
Via private email

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE

Steven H. Hall, Complainant,	)	EEOC NO. 570-2013-00245X Agency No. HS-HQ-22253-2012
v.	)	AJ: Frances del Toro
SECRETARY, DEPARTMENT OF HOMELAND SECURITY, Agency.	)	DATE: November 12, 2013

AGENCY'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR DECISION WITHOUT A HEARING

COMES NOW, the U.S. Department of Homeland Security ("DHS"), Headquarters ("Agency"), by and through its designated representative and counsel, and respectfully submits this Reply Brief in Support of its Motion for a Decision Without a Hearing, pursuant to 29 C.F.R. §1614.109(g)(1).

STATEMENT OF THE ISSUES

Complainant alleges that he was discriminated against and subjected to a continuing hostile work environment on the bases of his race (African American, color (black), sex (male), and reprisal (raised concern of discrimination on March 1, 2012) consisting of the following alleged discriminatory incidents:

1. From March 2011 through March 2012, the Occupational Safety and Environmental Programs Director, Dr. Teresa Pohlman, has denied Complainant's request to telework.

2. Since August 2011, Dr. Pohlman has denied Complainant developmental opportunities, including discouraging him from applying for a one-day Project Management course.

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3. From October 2011 to present, Dr. Pohlman has imposed expectations/requirements on Complainant that are inappropriate to his position and grade, namely:

    a. On a continuing basis since October 2011, Dr. Pohlman has required Complainant to: manage higher-graded professionals; monitor the status of weekly reports for which Program Analyst, Lisa Quiveors, has overall responsibility; press Ms. Quiveors to provide overdue reports; and micromanage her and monitor her whereabouts.
    b. On January 3, 2012, Complainant learned from Administrative Officer, Kathy Quandahl, that Complainant's request for an upgrade to GS-13 was denied.

4. Since about November 17, 2011, Dr. Pohlman has failed to address Ms. Quiveors' hostility toward Complainant, despite having raised his concerns on several occasions.

5. On February 15, 2012, Dr. Pohlman spoke to Complainant in a demeaning, impatient, and demanding tone.

6. On April 3, 2012, Dr. Pohlman denied Complainant's request to be detailed to a Training Instructor/Coordinator position in the Chief Human Capital Office.

7. On May 24, 2012, Dr. Pohlman issued Complainant a letter of Counseling for inappropriate behavior towards Ms. Quiveors.

8. On May 24, 2012, Dr. Pohlman issue Complainant a Notice of Management Directed Reassignment, Effective June 3, 2012.

9. On May 29, 2012, Dr. Pohlman did not provide Complainant with a closeout Performance Appraisal, which was important for Complainant's pay increase.

STATEMENT OF UNDISPUTED MATERIAL FACTS

In his Response to the Agency's Motion for a Decision Without a Hearing ("Response"), Complainant disputes the following facts set forth in the Agency's Motion for Decision Without a Hearing: Nos. 7, 8, 10, 13, 14, 15, 17, 18, 25, 26, 27, 28, 33, 39, and 41. Complainant sets forth undisputed facts in his Response. The facts disputed by Complainant do not preclude summary judgment in this case. A fact is "material" only if it has the potential to affect the outcome of the case. Couture v. Social Security

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Administration, EEOC Doc 01A11327, 2011 WL 991794 (August 27, 2001); Celotex v. Catrett, 47 U.S. 317 , 322-23 (1986). Here, none of these are genuine issues of disputed facts that are so material as to change out the outcome of the case. Some of them go to the Agency's legitimate non-discriminatory reasons which, even if disputed, cannot be shown to be pretext for discrimination. Thus, even assuming *arguendo* the facts as stated in Complainant's Response, summary judgment is appropriate in this matter.

DISCUSSION

A. Prima Facie Case

In the Response, Complainant asserts that he did in fact engage in protected activity prior to April 23, 2012. The alleged protected activity cited in the Response does not qualify as legally protected activity because they are not based on a protected category. Thus, Complainant's argument fails as a matter of law. Complainant v. Department of Defense, EEOC DOC 0120130949, 2013 WL 5962526 (October 29, 2013)(affirming dismissal of complaint where complainant complained of "bias and favoritism," and finding that unless complainant's opposition was because he believed the program was discriminatory because of race, color, religion, sex, national origin, age, or disabling condition then his opposition is not considered "protected activity" for the purpose of stating a viable retaliation claim.)

In the Response, Complainant disputes that alleged actors were not aware of any protected activity. While Dr. Pohlman and Ms. Quiveors were aware that Complainant had raised concerns, Ms. Quiveors also raised similar concerns about Complainant, and none of the concerns were based on a protected category. In addition, it is not relevant whether Ms. Quiveors was aware of any prior protected activity as she was not

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Complainant's supervisor but a co-worker. ROI 00302-00304. They both reported directly to Dr. Pohlman. Id. Ms. Quiveors had no decision making authority over Complainant's employment terms and conditions.

In a futile attempt to establish that similarly situated employees outside of his protected category were treated more favorably, Complainant tries to compare himself to other people under Dr. Pohlman's supervision. For example, asserts that Ms. Quiveors was allowed to telework on a regular basis while he was not. As the record reflects, Complainant is not similarly situated to those individuals. Ms. Quiveors was a Program Analyst, GS-13 and held a different position title and grade than Complainant. ROI 00302. In order to be similarly situated, employees must be similarly situated in all relevant aspects of employment. Saunders v. U.S. Government Printing Office, EEOC DOC 01934641, 1994 WL 744448 (June 14, 1994).

It is important to note that other directors, not just Dr. Pohlman, also decided and agreed that regular telework would not work for administrative assistants. ROI 00275-00276. Similarly, regular telework was not approved for Executive Assistants. One of the Executive Assistants, Ms. Lovato, was Caucasian female, thus, the decision was not directed only at males and was not directed only at African American employees. ROI 00096. Rather, it was based on job duties and meeting the mission needs of the Agency.

In his Response, Complainant cites to his testimony that Erika Eicholtz an African American Executive Assistant was promoted to Administrative Officer/HR Representative in the GS14 pay grade. Ms. Lovato, a Caucasian female was promoted from GS13 to GS14. Both these employees reportedly directly to Mr. Wilson. ROI 00096. He cites this as evidence that other EA's had their positions upgraded.

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Complainant's argument is flawed because a position "upgrade" which is what Complainant was requesting, is quite different than a "promotion" which is what the executive assistants received. Furthermore, under well-settled law, reclassification or upgrade of an existing position may not be used as a vehicle or method to promote civil service employees without examination. McNamara v. McCoy, 36 A.D.2d 787, 319 N.Y.2d 92 (3rd Dept. 1971). The reclassification of a civil service position is *barred* in the absence of a competitive examination. Joyce v. Ortiz, 108 A.D. 2d 158, 487 N.Y.2d 746 (1st Dep't 1985). With respect to his request for an upgrade of position from GS-12 to GS-13, Complainant admits there are no GS-13 Administrative Assistants in his work unit. ROI Tab F2a p. 13.

B. Agency has Legitimate Non-Discriminatory Reasons and Complainant Cannot Establish Pretext

Even assuming *arguendo* that a prima facie case was established, which the Agency denies, the Agency has presented legitimate, non-discriminatory reasons for its actions, and the burden again shifts to the complainant to demonstrate that the Agency's reasons are not credible. The ultimate burden of proving discrimination remains with the Complainant. Complainant fails to demonstrate sufficient facts to show that the Agency's legitimate, non-discriminatory reasons were more likely than not a pretext for some discriminatory animus. Complainant has not produced evidence to establish the Agency's conduct was based on race, sex, color, or prior EEO activity. Simply disagreeing with the Agency's decisions does not prove pretext. Complainant must prove by a preponderance of the evidence that the Agency's explanations are a pretext for reprisal discrimination. Jackson v. Department of the Army, EEOC DOC 012010524, 2010 WL 3137310 (July 30, 2010).

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Thus, Complainant's claims must fail as a matter of law.

CONCLUSION

For the reasons set forth above and in Agency's Motion for Decision Without a Hearing, summary judgment should be granted.

Respectfully submitted,

DEPARTMENT OF HOMELAND SECURITY,

/S/ Grace H. Lee

Grace H. Lee
Attorney-Advisor
Office of the General Counsel
U.S. Department of Homeland Security

Attachment (2)

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2013, I served copies of the foregoing Reply in Support of Motion for Decision Without a Hearing, via the methods indicated below to:

Honorable Frances del Toro (via electronic mail)
Administrative Judge
Equal Employment Opportunity Commission
Washington Field Office
131 M. Street, N.E. Suite 4NW02F
Washington, DC 20507

Representative for Complainant (via electronic mail)
Rosemary Dettling, Esq.
Federal Employee Legal Services Center
1629 K Street NW Suite 300
Washington, DC 20006
rdettling@felsc.com

/S/ Grace H. Lee

Grace H. Lee
Attorney-Advisor
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U.S. Department of Homeland Security
Washington, DC 20528
Telephone: (202) 447-4135
Facsimile: (202) 447-3111

Attachment (2)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office
131 M Street, N.E.
Washington, D.C. 20507

Steven Hall, **Complainant** **v.** **Janet Napolitano, Secretary,** **U.S. Department of Homeland Security,** **Agency.**	**EEOC Case No. 570-2013-00245X** **Agency No. HS-HQ-22253-2012** **Date: November 21, 2013**

ORDER ENTERING JUDGMENT

For the reasons set forth in the enclosed Decision dated November 21, 2013, judgment in the above-captioned matter is hereby entered. A Notice To The Parties explaining their appeal rights is attached.

This office is also enclosing a copy of the hearing record and the Report of Investigation for the Agency.

It is so ORDERED.

For the Commission:

Frances del Toro
Administrative Judge

Enclosures

Attachment(3)

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing documents within five (5) calendar days after the date they were sent *via* first class mail. I certify that on November 21, 2013, the foregoing documents were sent *via* first class mail to the following:

Steven H. Hall
7141 Chesapeake Village Boulevard
Chesapeake Beach, MD 20732

Rosemary Dettling, Esq.
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Grace H. Lee
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Washington, DC 20528

Crystal Young, Complaints Adjudication Manager
U.S. Department of Homeland Security
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245 Murray Drive, Building 410, CRCL/M0191
Washington, DC 20528

Frances del Toro
Administrative Judge

Attachment (3)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office
131 M Street, N.E.
Washington, D.C. 20507

Steven Hall, **Complainant** v. **Janet Napolitano, Secretary,** **U.S. Department of Homeland Security,** **Agency.**	**EEOC Case No. 570-2013-00245X** **Agency No. HS-HQ-22253-2012** **Date: November 21, 2013**

DECISION

This Decision is issued pursuant to 29 C.F.R. § 1614.109(g) (2013). Complainant filed a formal complaint of discrimination against the U.S. Department of Homeland Security ("Agency" or "DHS"), alleging that the Agency discriminated against him in violation of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000e *et seq.* ("Title VII"). On July 3, 2013, this office issued an Acknowledgment and Order. On October 21, 2013, the Agency filed Agency's Motion for a Decision Without a Hearing ("Agency's Motion"). On November 5, 2013, Complainant filed Complainant's Response to Agency's Motion for Decision Without a Hearing ("Complainant's Response"). On November 12, 2013, the Agency filed Agency's Reply Brief in Support of its Motion for Decision Without a Hearing ("Agency's Reply"). The remaining procedural history is contained in the case file and the Report of Investigation ("ROI"), and will not be reiterated. The record before me consists of the ROI and the parties' submissions.

CLAIMS

Complainant alleges that he was discriminated against and subjected to a continuing hostile work environment on the bases of his race (African American), color (Black), sex (male), and reprisal (raised concern of discrimination on March 1, 2012), based on the following alleged discriminatory incidents:

1. From March 2011 through March 2012, the Occupational Safety and Environmental Programs Director, Dr. Teresa Pohlman, has denied Complainant's request to telework;

2. Since August 2011, Dr. Pohlman has denied Complainant developmental opportunities, including discouraging him from applying for a one-day Project Management course;

3. From October 2011 to the present, Dr. Pohlman has imposed expectations/requirements on Complainant that are inappropriate to his position and grade, namely:

a. On a continuing basis since October 2011, Dr. Pohlman has required Complainant to: manage higher-graded professionals; monitor the status of weekly reports for which Program Analyst, Lisa Quiveors, has overall responsibility; press Quiveors to provide overdue reports; micromanage her and monitor her whereabouts.

b. On January 3, 2012, Complainant learned from Administrative Officer, Kathy Quandahl, that Complainant's request for an upgrade to GS-13 was denied;

4. Since about November 17, 2011, Dr. Pohlman has failed to address Quiveors' hostility toward Complainant, despite having raised his concerns on several occasions;

5. On February 15, 2012, Dr. Pohlman spoke to Complainant in a demeaning, impatient, and demanding tone;

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6. On April 3, 2012, Dr. Pohlman denied Complainant's request to be detailed to a Training Instructor/Coordinator position in the Chief Human Capital Office;

7. On May 24, 2012, Dr. Pohlman issued Complainant a Letter of Counseling for inappropriate behavior towards Quiveors;

8. On May 24, 2012, Dr. Pohlman issue Complainant a Notice of Management Directed Reassignment, effective June 3, 2012; and

9. On May 29, 2012, Dr. Pohlman did not provide Complainant with a closeout Performance Appraisal, which was important for Complainant's pay increase.

FACTS

1. Complainant was hired in August 2010, as an Administrative Assistant in Office of Chief Administrative Officer ("OCAO").

2. Complainant's first line supervisor was Dr. Teresa Pohlman, Director of Occupational Safety and Environmental Programs Office of Chief Administrative Officer OCAO.

3. Complainant was the only Administrative Specialist who worked under Dr. Pohlman.

4. Dan Wilson was the Chief of Staff for OCAO.

5. Scott Myers was the Acting Deputy of CAO from January 2012 until July 2012.

6. Lisa Quiveors is a Program Analyst, GS-13, OCAO. She has been in this position since August 2011. She also reported to Dr. Pohlman and was co-workers with Complainant.

7. Complainant requested two types of telework at various times: "episodic" and "regular." ROI Tab F3 pp. 3-6. Dr. Pohlman approved Complainant's requests for episodic telework.

8. Complainant requested teleworking on a regular basis to increase his quality of life; decrease commuting expenses; and to take care of personal or family matters, such as caring for family members. In response to Complainant's request, Dr. Pohlman informed Complainant that the

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policy of the CAO front office was that Administrative Specialists were not authorized to telework on a regular basis.

9. On February 27, 2012, Complainant submitted an e-mail to Dr. Pohlman requesting telework one day per week to save on transportation costs. Dr. Pohlman informed Complainant that telework was not available for Administrative Assistants and would not become available in the near future.

10. On March 1, 2012, from approximately 10:30 a.m. to 11:45 a.m., Complainant and Dr. Pohlman met in her office in an unscheduled meeting. During this meeting, Complainant said he felt disrespected and discriminated against; and that Administrative Specialists were disrespected and not treated as equal partners in the CAO organization. Complainant also stated that he wanted to transfer to another DHS rotational assignment or position. Dr. Pohlman stated that Complainant became agitated and used profanity.

11. Dr. Pohlman was concerned by Complainant's conduct during the March 1, 2012 meeting and contacted human resources and the office of personnel security.

12. None of the Administrative Assistants or Executive Assistants in the division were allowed to participate in regular telework.

13. In a February 29, 2012 e-mail to Dana Crawford, Employee Relations Specialist, Complainant stated the Administrative Assistants were being discriminated against based on their positions.

14. The other Executive Assistants and Administrative Assistants working in the division during the period of March 2011 to March 2012 were also African American and supported other directors and supervisors in OCAO.

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15. At the beginning of the year, Dr. Pohlman sat down with Complainant and agreed to an individual development plan and the requests on his list.

16. Complainant requested to attend a one-day Project Management training course that was being held on the same day as the Combined Federal Campaign ("CFC") meeting. Dr. Pohlman had previously requested Complainant to serve as the CFC Key Person. Dr. Pohlman originally denied this request due to the meeting conflict, but later approved the training.

17. Complainant raised concerns to management regarding Dr. Pohlman in October 2011. The Agency responded by having Mary Prystal, Employee Relations Specialist, CHCO, speak with Complainant and Dr. Pohlman. Complainant met with Ms. Prystal and expressed his concerns about Dr. Pohlman's management style.

18. In November 2011, Dr. Pohlman met with Complainant and Quiveors, to discuss their working relationship and to discuss better ways to accomplish administrative tasks such as scheduling meetings and the conference room calendar.

19. On December 28, 2011, Complainant requested that his position be reclassified and upgraded from a GS-12 to a GS-13.

20. The request for a change in grade was not approved by the Agency because Complainant's job duties and responsibilities were consistent with the grade level he was in, and consistent with the other Administrative Specialists who were performing similar duties and responsibilities.

21. At the time relevant to the present complaint, there were no GS-13 Administrative Assistants in Complainant's work unit.

22. On March 14, 2012, during a meeting with Dr. Pohlman, Quiveors alleged that since October 2011, Complainant had engaged in inappropriate behavior such as inappropriately touching her hair; making inappropriate comments to her regarding her appearance; and making

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inappropriate romantic overtures toward her. Quiveors also complained about a voicemail message that Complainant left for her. Quiveors provided a written statement in support of her allegations to Chief of Staff Daniel Wilson.

23. On March 15, 2012, Complainant learned of the sexual harassment allegations made against him by his co-worker Quiveors.

24. Employee Relations Specialist Irene Cuttita conducted an investigation of the sexual harassment allegations.

25. On March 28, 2012, Complainant met with Cuttita regarding the sexual harassment claim against him.

26. During Complainant's interview on March 28, 2012, he expressed concern about returning to his current OCAO location and stated that he would not like "to go back to OCAO" because he feels "too embarrassed" and "too hurt." Complainant also stated that he did not want to go back to OCA and work for Dr. Pohlman. He also stated that working with Quiveors would cause him "to be worried to say anything to her." ROI Tab F3c p. 3.

27. Complainant applied for a detail on April 3, 2012, as a Training Coordinator, GS13/14 position, and as a Training Coordinator Assistant, GS 12/13. Complainant was denied both detail requests pending the outcome of the sexual harassment investigation involving him.

28. During the investigation, Complainant was asked to temporarily telework.

29. Based on the results of the investigation, management received a memorandum dated May 11, 2012, recommending the following actions against Complainant: 1) a Letter of Counseling; 2) a Letter of Reprimand; and 3) Termination of Employment.

30. On May 24, 2012, Dr. Pohlman issued a Letter of Counseling to Complainant indicating that his behavior toward Quiveors was utterly inappropriate. The Letter of Counseling was the least

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punitive of the recommended actions against Complainant. Complainant also received a Management Directed Reassignment Letter reassigning him to another division.

31. Complainant was reassigned for 4-8 weeks to a brief rotational detail with the United States Coast Guard, along with 10-20 other detailed OCAO personnel including GS-12's, GS-13's and GS-14's.

32. The decision to reassign Complainant was made by Myers. The decision to reassign was made based on the following: the person who was handling the administrative work at St. Elizabeth's was transferred to the Exec Sec position at 650 Mass Ave location, leaving an open administrative position; and the CAO office was going through an organizational realignment. Specifically, the group that Dr. Pohlman was managing was to be realigned with the Asset Management group. The Asset Management group had an Administrative Specialist, and there was no need to have two specialists for the new group. Thus, this left Complainant without a position. Moreover, management took into consideration the results of the investigation recommending that Complainant not work at the same location as Quiveors, and Complainant's request not to go back to CAO.

33. Complainant was provided a closeout performance appraisal on June 4, 2012, which was the first business day available after his reassignment went into effect on June 3, 2012. In addition, Dr. Pohlman approved his within grade step increase on June 14, 2012.

STANDARD FOR DECISION WITHOUT A HEARING

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits and other evidence establish no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. § 1614.109(g); *see also Murphy v. Dep't of the Army*, EEOC Appeal No. 01A04099 (July 11, 2003) (noting that the regulation

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governing decisions without a hearing is modeled after the Federal Rules of Civil Procedure, Rule 56). Only disputes over facts that might affect the outcome of the suit under governing law, and not irrelevant or unnecessary factual disputes, will preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There is no genuine issue of material fact if the relevant evidence in the record, taken as a whole, indicates that a reasonable fact-finder could not return a verdict for the party opposing summary judgment. *Id.* wanted

In opposing summary judgment, Complainant "may not rest upon … mere allegations." *See* Fed. R. Civ. P., Rule 56(e). Instead, she "must set forth specific facts showing that there is a genuine issue" that requires a hearing. *See id.* To establish a factual dispute, affidavits must "be made on personal knowledge, … set[ting] forth such facts as would be admissible in evidence…" *See id.*; *see also Greene v. Dalton,* 164 F.3d 671, 675 (D.C. Cir. 1999). In this administrative process, summary judgment may only be granted when the record is sufficiently developed to support a decision without a hearing, keeping in mind the quasi-investigative nature of these proceedings. *See Petty v. Dep't of Defense,* EEOC Appeal No. 01A24206 (July 11, 2003); *Murphy,* EEOC Appeal No. 01A04099. Here, I find that the investigative record has been adequately developed, and both parties have had the opportunity to engage in discovery. Complainant was given ample notice of the Agency's Motion, the Agency provided a comprehensive statement of the undisputed facts, and Complainant had the opportunity to respond to the Agency's Motion.

ANALYSIS

To establish a *prima facie* case of disparate treatment, Complainant may demonstrate that he was treated less favorably than a similarly situated employee outside of his protected group. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978). Absent comparative data,

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Complainant may also establish a *prima facie* case by setting forth sufficient evidence to create an inference of discrimination. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981), n. 6; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

In order to establish a *prima facie* case of retaliation, Complainant must show that: (1) he engaged in a statutorily protected EEO activity; (2) the Agency was aware of the EEO activity; (3) the employer took an adverse employment action against Complainant; and (4) a causal connection exists between the EEO activity and the adverse action (*e.g.*, action in question followed the protected activity within such a period of time that a retaliatory motivation may be inferred). *See Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1423 (D.C. Cir. 1988); *McKenna v. Weinberger,* 729 F.2d 783, 788, 790 (D.C. Cir. 1984).

If Complainant establishes a *prima facie* case of discrimination, the burden then is on the Agency to articulate a legitimate, nondiscriminatory reason for its challenged actions. *See Burdine*, 450 U.S. at 252-54; *McDonnell Douglas Corp.* 411 U.S. at 802. If the Agency does so, the *prima facie* inference drops from the case. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 510-11 (1993). Complainant then has to prove by a preponderance of the evidence that the proffered explanation is a pretext for unlawful discrimination. *See Hicks,* 509 U.S. at 511; *Burdine*, 450 U.S. at 252-53; *McDonnell Douglas*, 411 U.S. at 804. Complainant always retains the ultimate burden of persuading the trier of fact that the Agency unlawfully discriminated against him. *See Hicks*, 509 U.S. at 511; *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)

It is well-settled that harassment based on an individual's protected bases is actionable. *See Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986). In order to establish a claim of harassment, Complainant must show that: (1) he belongs to the statutorily protected class; (2) he

Attachment (3)

was subjected to unwelcome conduct related to his membership in the protected class; (3) the harassment complained of was based on his membership in the protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. *See Humphrey v. United States Postal Serv.*, EEOC Appeal No. 01965238 (October 16, 1998); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

A single incident or group of isolated incidents will not be regarded as discriminatory harassment unless the conduct is severe. *See Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358 (11th Cir. 1982). Whether the harassment is sufficiently severe to trigger a violation of Title VII must be determined by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

I find that the Agency's Motion and Agency's Reply correctly state the material facts and applicable legal standards. There are no *genuine* issues of *material* fact or credibility that require resolution at a hearing. Accordingly, summary judgment in favor of the Agency is appropriate for the reasons stated in the Agency's Motions. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Although the initial inquiry in a discrimination case usually focuses on whether Complainant has established a *prima facie* case, following this order of analysis is unnecessary when the Agency has articulated legitimate, nondiscriminatory reasons for its actions. *See Washington v. Dep't of the Navy*, EEOC Petition No. 03900056 (May 31, 1990). In such cases,

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the inquiry shifts from whether Complainant has established a *prima facie* case, to whether he has demonstrated by a preponderance of the evidence that the Agency's reasons for its actions were merely a pretext for discrimination. *Id. See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-17 (1983). In this case, I find that the Agency has articulated legitimate, nondiscriminatory reasons for its actions.[1]

With respect to Complainant's claim that he was denied telework, the Agency stated that employees may be allowed to telework on a regular basis based on the needs of the office and the responsibilities of the position. The Agency further explained that in OCAO, none of the Administrative Assistants were allowed to telework on a regular basis regardless of race, color, sex, and prior EEO activity. In addition, the Agency indicated that Administrative Assistants were no allowed to telwork on a regular basis because the nature of their job and responsibilities required Administrative Specialists to be in the office on a standard basis. Dr. Pohlman, however, approved an alternative work schedule for Complainant. According to the Agency, the determination regarding participation in the telework program was always consistently applied to all Administrative Specialists in CAO. Moreover, the Agency asserted that during the March 1, 2012 meeting with Dr. Pohlman, Complainant did not tell Dr. Pohlman that he believed that the denial of telework was discrimination based on race or any other protected category; but based on his position as an Administrative Specialist.

With respect to Complainant's allegation that he was denied development opportunities, the Agency stated that Complainant's requests through his Individual Development Plan were

[1] Nevertheless, with respect to Complainant's retaliation claims, I find that he failed to show that he engaged in protected activity prior to the alleged discriminatory events or that the responsible management officials knew of his prior protected activity. With respect to Complainant's claims of disparate treatment, I also find that Complainant failed to show that similarly situated individuals outside of his protected classes were treated more favorably. *See Smith v. Dep't of the Navy*, EEOC Request No. 05931128 (July 7, 1994) (in order for two or more employees to be considered similarly situated, all relevant aspects of the employees' work situation must be identical or nearly identical).

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approved and that and he been given several other developmental opportunities, including additional Records Management Training tailored specifically to OCAO records managers, as well as mandatory DHS training. The Agency further stated that Dr. Pohlman encouraged Complainant to add Project Management and other courses (such as Contracting and Introduction to Grants) to his Individual Development Plan.

The Agency explained that on one occasion, Complainant's training request was denied because the date conflicted with another important meeting. Specifically, Complainant requested to attend a one-day training on Project Management on the same day of a meeting for the Combined Federal Campaign kick-off. The Agency indicated that Dr. Pohlman had previously asked Complainant to work as a CFC worker. Dr. Pohlman directed Complainant to find another date for the Project Management course because CFC meeting attendance was mandated by front office, but he never provided her with an alternative date. Additionally, in April 2012, Complainant completed an application for a detail to a Training/Instructor position in the OCHCO Training Department. According to the Agency, Complainant's request was denied on April 3, 2012, pending the outcome of an investigation into sexual harassment allegations made against him.

With respect to Complainant's claim that he was imposed requirements that were inconsistent with his position, the Agency stated that Complainant was assigned duties and responsibilities in accordance with his position description, grade level, and performance plan. The Agency averred that Complainant was assigned the same duties as other Administrative Assistants. Regarding weekly reports, the Agency explained that Complainant was responsible for distributing and archiving weekly reports that were assembled and edited by Quiveors, a Program Analyst. Moreover, as a coordinator of the weekly reports, Complainant would have

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had to monitor the status of them, and said task is included in Performance Goal No. 1 of his performance plan.

Complainant was also responsible for monitoring the location of all employees in Dr. Pohlman's group, including Quiveors, as part of his duties in coordinating the telework calendar as described in his Performance Plan, Goal 1. Complainant was responsible for office management as stated in his Performance Plan, Goal 1: Office management. Additionally, these duties included (but were not limited to) working as weekly Activity Report Coordinator, Managing/Maintaining calendar Schedule, and Correspondence Custodian.

Complainant alleges that he was denied an upgrade to a GS-13 in January 2012, after requesting on December 28, 2011, that his position be reclassified and upgraded. The Agency explained that the upgrade was not approved because Complainant's job duties and responsibilities were consistent with his current grade level and the other administrative specialists who were performing similar duties and responsibilities. Moreover, Complainant's position was a career ladder GS-9/11/12. Therefore, in order to reclassify Complainant to a GS-13/14, he would have had to apply and be hired into a different position listed as a GS-13. The Agency further indicated that there are no GS-13 Administrative Assistant positions. Lastly, no positions in OCAO were upgraded during this period.

With respect to Complainant's allegation that his concerns about Quiveors' hostility towards him were not addressed, the Agency asserted that Complainant never raised a concern to Dr. Pohlman about Quiveors' allegedly hostile treatment towards him. The Agency further stated that Complainant only raised concerns about business processes and the way projects were being handled. The Agency explained that there was an ongoing professional disagreement between Quiveors and Complainant concerning how to work on projects; including a

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disagreement about the steps, processes, and procedures necessary to accomplish certain tasks and incomplete work. After both employees complained to Dr. Pohlman about their disagreements, a meeting was held in October 2011. According to the Agency, Dr. Pohlman ultimately reassigned the work to other employees. Moreover, Prystal also met with Complainant in October 2011 to address his concerns.

With respect to Complainant's allegation that Dr. Pohlman spoke to Complainant in a demeaning, impatient and demanding tone; Dr. Pohlman denies treating Complainant in such manner. The Agency asserted that the other two African-American employees supervised by Dr. Pohlman did not experience demeaning or differential treatment from her based on race and/or color. Moreover, Quiveors affirmed that Dr. Pohlman treated all of her subordinates the same way, and that she did not believe Dr. Pohlman was demeaning towards any employees. Likewise, Marie Ecton, African American, stated that Dr. Pohlman does not speak in a demeaning manner, and that she has never observed Dr. Pohlman treating Complainant in a demeaning or hostile manner.

With respect to Complainant's claim that he was denied a detail to a Training Instructor position, the Agency admitted that Complainant's request was denied. The Agency, however, explained that Dr. Pohlman denied Complainant's request based on the pending outcome of an ongoing sexual harassment investigation made against Complainant. Additionally, Dr. Pohlman considered in her decision the fact that the division did not have the pending work or adequate resources to justify a rotational assignment.

With respect to Complainant's allegation that the Agency improperly issued him a Letter of Counseling, the Agency explained that the action was taken as a result of the findings in the sexual harassment investigation against Complainant. The sexual harassment investigation was

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concluded on May 11, 2012, and it was determined that Complainant's behavior toward Quiveors was inappropriate. In particular, Complainant's voice mail message to Quiveors where he stated that she "sounded like she was under the bed." ROI Tab Fa3 p. 20. The Agency explained that based on the results of the investigation, management received a memorandum dated May 11, 2012, outlining the options available against Complainant. Those were: 1) a Letter of Counseling; 2) a Letter of Reprimand; and 3) Termination of Employment. Subsequently, management decided to issue a Letter of Counseling on May 24, 2012, because it was the least punitive of the recommended actions against Complainant.

Regarding Complainant's claim that he was inappropriately reassigned, the Agency stated that there were two reasons for the decision. The first was that part of the recommendations included in the Options Memorandum dated May 11, 2012 (results of the sexual harassment investigation), recommended that Complainant and Quiveors be geographically and organizationally separated.

The second was that due to a reorganization in the division, Complainant's position was eliminated. As a result, Complainant was reassigned to the position of Administrative Specialist, Headquarters Management Division ("HMD"). Moreover, the Agency indicated that Complainant had previously expressed his concern about returning to his current OCAO location and working with his supervisor and Quiveors. Specifically, Complainant stated that he did not want "to go back to OCAO" because he felt "too embarrassed" and "too hurt" as a result of the sexual harassment investigation. ROI Tab F3c p. 3.

The Agency further explained that Complainant's reassignment was not a punishment and that the work was not beneath his educational background and military experience. The reassignment was set for 4-8 weeks as a brief rotational detail with the U. S. Coast Guard, along

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with 10-20 other detailed OCAO personnel including GS-12's, GS-13's and GS-14's. According to the Agency, another Administrative Specialist, Carleton Evans, was also assigned to this rotational assignment.

Complainant asserted that he was not provided an opportunity to appeal the reassignment decision. The Agency stated that Complainant was reassigned according to organizational priorities and management's discretion. The Agency explained that management has discretion to reassign employees without appeal rights, and that Administrative Specialists were also informed when hired that they were subject to rotations to each functional area each year.

Lastly, with respect to Complainant's claim that he was denied a close-out performance appraisal, the Agency stated that his contention is without merit. The Agency explained that Complainant was provided a close-out appraisal on June 4, 2012, the first business day that it could be scheduled subsequent to his reassignment coming into effect on June 3, 2012.

As the Agency has articulated legitimate, non-discriminatory reasons for its actions, the burden now shifts to Complainant to demonstrate that there is a genuine dispute as to whether the Agency's proffered reasons are a mere pretext for discrimination. Complainant, however, has failed to present substantive evidence to refute the Agency's articulations. I also conclude that other than Complainant's uncorroborated assertions, the record is devoid of any evidence that the Agency's actions were based on discriminatory animus.

Next, I find that Complainant failed to present sufficient evidence to show that he was subjected to a hostile work environment. Specifically, Complainant has presented insufficient evidence to support an inference of a causal link between the alleged incidents and his protected bases, and the limited evidence presented falls far short of establishing a hostile work environment. *See Jones v. Dep't of State*, EEOC Appeal No. 01995660 (January 24, 2002) citing

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Babick v. Dep't of the Navy, EEOC Appeal No. 01A14334 (December 17, 2001)(Title VII is not a "general civility code").

Furthermore, I conclude that the incidents, taken individually or as a group, do not rise to the level of harassment within the meaning of the law. *See Phillips v. Dep't of Veterans Affairs*, EEOC Request No. 05960030 (July 12, 1996); *Banks v. Dep't of Health and Human Services*, EEOC Request No. 05940481(February 16, 1995). Thus, considering all the record evidence and looking at all the allegations *in toto*, I find that the alleged conduct cannot be considered sufficiently severe or pervasive to have altered the conditions of Complainant's work environment. *See Meritor*, 477 U.S. at 67.

Complainant has failed to set forth adequate material evidentiary facts that support his allegations of discrimination. Conclusory assertions that the Agency's intentions and motivations are questionable are not enough to withstand a summary judgment motion. *Goldberg v. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1987); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365(4th Cir. 1985); *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997). The Commission has found that "[e]mployers generally have broad discretion to set policies and carry out personnel decisions and should not be second guessed be a reviewing authority absent evidence of unlawful motivation." *Holley v. Dep't of Veterans Affairs*, EEOC Request No. 05950842 (November 13, 1997). Here, there is no evidence that the Agency's actions were based upon an unlawful discriminatory motive. Accordingly, because Complainant has not created a genuine issue of material fact with regard to the Agency's articulated reasons, I find that Complainant's allegations of disparate treatment and hostile work environment cannot survive summary judgment.

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DECISION

For the foregoing reasons, and in the absence of any evidence indicating that the Agency's actions were discriminatorily motivated, I find that Complainant's claims of discrimination cannot survive Summary Judgment.

SO ORDERED.

Frances del Toro
Administrative Judge

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UNITED STATES AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE

STEVEN H. HALL,
Complainant,

v.

Appeal No. 0120140975
Hearing No. 570-2013-00245X
Agency No. HS-HQ- 22253-2012

JEH JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY,
Agency.

DATE: October 27, 2016

APPEALING EEOC DECISION

I received EEOC latest decision on September 28, 2016. As a male African-American, I am requesting that the Equal Employment Opportunity Commission (EEOC) accept my appeal of retaliation, hostile working environment, false allegation of sexual harassment, defamation of character and slander, obstructing justice, coercion, overt racism, and prohibited personnel practices; favoritism. I am providing responses regarding Department of Homeland Security, Office of Chief Administration Officer, (OCAO) and Office of the Chief Human Capital Officer (OCHCO) employees under the Management component conspired against me.

Management refused to hold Dr. Teresa Pohlman (Dr. P), a Senior Executive Series employee accountable for dictating and abusing her authority that intimidated subordinate employees before and during an inappropriate behavior (IB) and sexual harassment (SH) Inquiry and Investigation. Dr. P omission (failure to act) resulted in a false allegation of SH complaint filed against me. Dr. P collaborated in sexism, retaliation, mismanaged my career, condoned a hostile working environment (HWE), and forced reassignment that resulted in me becoming seriously ill. An EEOC Administrative Judge, a female did not properly issue a decision without a hearing and failed to find that I was subjected to unlawful discrimination to include unfair treatment and disability discrimination.

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Claim #1. From August 2010 to September 2012, Management denied me and other African-Americans Administrative Specialist (AS) and Executive Assistants (EA) the opportunity to telework. Management allowed two Caucasian females to telework three days per week; Ms. Rhonda Lovato, EA and Kathy Quandahl, Admin Officer. ROI page 59. There was no telework policy that denied anyone from teleworking. ROI page 276. [We] AS's/EA's created a proposal underlying the responsibilities and duties to allow [us] to telework. ROI page 136-144.

Claim #2. Management denied my request to attend Project Management (PM) training; the training did not conflict with the Combined Federal Campaign Kickoff. ROI page 278. Dr. P denied me the opportunity to participate in the PM training along with other training.

Claim #3. Around September 2011, the Virtual Office (VO) SharePoint software was put in place, and this allowed each employee to enter their annual and sick leave, TAD, off-sites, and telework. The VO eliminated the telework calendar. Mr. Wilson stated before hiring that AS's (GS-12's) were not hired to monitor executive's calendar. AS's did perform similar duties, but Management increased our duties and responsibilities, and our Position Description (PD) did not include storage of information and data.

Claim #4. On October 18, 2011, November 17, 2011, and March 1, 2013, I had raised issues with Dr. P and Ms. Mary Prystal, OCHCO Employee Relations Specialist (ERS) regarding mismanagement of my career and hostility from Ms. Lisa Quiveors, but was forced to remain in the hostile working environment. ROI pages 6, 7, 9,10, 31-34. Dr. P and Prystal did not address my concerns and later resulted in Ms. Lisa Quiveors filing a false allegation.

Claim #5. On February 15, 2012, was not the only day that Dr. P spoke to me in a demeaning and impatient tone, on several occasions Dr. P showed anger towards me because I had complained of her mismanaging my career and forced me to remain in an HWE. Dr. P had a boyfriend name Gene; she would scold me if he called and I forgot to take a personal message. ROI pages 101-102. DHS EEO never investigated Dr. P regarding her relationship.

Claim #6. From March 16, 2012 to June 3, 2012, I was not gainfully employed while on administrative leave awaiting the outcome of the Investigation. ROI page 103-104. In December 2012, Dr. P denied me a performance bonus citing a conduct issue. Attachment 1. From March 19, 2012 to April 20, 2012, Management made a predetermined decision to deny me a detail. Management failed to state that a training reassignment was within the

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same Management component and this could have enhanced my career. EEOC stated; "We find it reasonable for the Agency to not want to reassign Complaint."

Claim #7. Cutitta SH Investigation was inaccurate, I never engaged in IB towards Quiveors, a Program Analyst, nor left a voicemail message stating; "she sound like she was under the bed." On March 28, 2012, I testified to Cutitta that Quiveors voice sounded like she was under the bed due to allergies or a cold. Cutitta violated her Investigation by illegally sharing with Dr. P evidence as confirmed by Dr. P. ROI page 173. Also, I never said that Quiveors voice sounded sexy. ROI page 108-109, 224. Cutitta and Dr. P purposely tainted the Investigation and Post-Investigation to divert the attention from Dr. P regarding her mismanagement of my career and retaliation while I was in an HWE.

Claim #8. Dr. P and Management retaliated by reassigning me to HMD at St. Elizabeth's, but refused to reassign me to OAO/NAC so I could enhance my career development and be geographically and organizationally separated. The Management Directed letter never inform me that my position was eliminated, nor was I issued a PD and SF-50 explaining duties, responsibilities, safety and health risks. A reassignment to OAO/NAC would have eliminated the embarrassment and hurt. Management failed to mention that Ms. Alberta Singletary was an AS already assigned to the HMD division. Ms. Singletary and I could have rotated back and forth and supported the AS opening at St. Elizabeth's.

Claim #9. Dr. P did provide me a close-out performance appraisal, but failed to provide me an updated PD and SF-50 to change my location to HMD at St. Elizabeth's. The updated PD and SF-50 were vital information in regards to my duties, responsibilities, safety and health.

False Allegation of Sexual Harassment. From October 2011 to March 2012, Quiveors documented several false allegations of SH against me. On March 15, 2012, I contacted DHS EEO to file a complaint regarding unfair treatment and a false allegation of SH. Ms. Quiveors and I had an unsettled working relationship for which I was forced to remain in an HWE and denied a detail. Quiveors documented several false allegations against me indicating that I had touched, verbally harassed, and called her sexy. ROI page 371. Quiveors fail to report her allegations in a timely manner. Unlike in a previous situation, Quiveors stated; "***a male co-worker touched her breast and I reported it. There was no claim. There was no paperwork.***" ROI page 315. Quiveors was delusional based on the fact that she could not provide any real evidence of SH. Quiveors retaliates by filing a false SH complaints against me regarding our unsettled working relationships. I have never touched or verbally harassed Quiveors and no preponderance of evidence was provided by Quiveors and her false allegations of IB and SH were not creditable.

Inquiry regarding alleged misconduct; Inappropriate Behavior. On March 14, 2012, Dr. P met with Ms. Quiveors in an OCAO conference room and discussed the alleged inappropriate behavior (IB) and sexual harassment (SH) for two hours. Dr. P contacted and informed Mr. Wilson and Cutitta regarding Quiveors alleged IB and SH complaint against me. On March 15, 2012, Mr. Dan Wilson contacted and informed me that Quiveors filed a SH complaint against me. ROI pages 369-370. I contacted DHS EEO complaining about a false allegation of SH. On March 19, 2012, I provided Mr. Wilson a written statement and I posed a question; "***When did Ms. Quiveors feel that she was being sexually harassed and did she report it to anyone immediately***." ROI page 00003. My question was not answered and I was never informed that a sexual-laced voicemail message existed. Mr. Wilson stated; "***I began my directed inquiry into the alleged misconduct, I realized there were several issues at hand, that seemed to cloud the inquiry***." ROI page 285. My complaint of a false allegation of SH should have halted Mr. Wilson's Inquiry. Mr. Wilson coerced me into writing a statement regarding the alleged IB and SH for which was sabotaged to justify reassigning me to HMD, defamed my character and slandered my reputation. Mr. Wilson obstructed justice by concealing and withholding vital evidence and information from me. Mr. Wilson Inquiry was a major debacle and to avoid disciplinary actions he passed his Inquiry to Cutitta for investigating. ***The Inquiry should have been dismissed or routed to another DHS component for an impartial review***. Dr. P did not remove herself from the Inquiry and this tainted Cutitta's SH Investigation before it was initiated.

Investigation regarding alleged misconduct; Sexual Harassment. Dr. P, a SES dictated and abused her authority while intimidating all GS-13/14/15 OCAO and OCHCO employees involved in the Inquiry and Investigation. On March 15, 2012, I contacted DHS EEO to file a complaint regarding unfair treatment and a false allegation of SH. All OCAO and OCHCO employees conformed to Dr. P discriminatory treatment and prohibited personnel practices. OCAO and OCHCO GS-13/14/15 employees feared that their careers would be ruined if they had reported Dr. P for "failing to act" regarding retaliation, mismanagement of my career, and for condoning an HWE, and for sabotaging the Inquiry and Investigation. On March 28, 2012, Ms. Cutitta had Qiveors, Dr. P, and I meet with her to discuss the IB and SH allegations. Ms. Cutitta coerced me into providing a verbal testimony regarding the alleged allegations for which was sabotaged to justify reassigning me to HMD, defamed my character and slandered my reputation. From March 28, 2012 to May 23, 2012, Dr. P

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continuously passed on information to Cutitta regarding the IB and SH allegations against me and made revisions to the Letter of Counseling and Management Directed letter during a EEO investigation. ROI pages 341-345. Attachment 8. My complaint to DHS EEO invalidated Mr. Wilson's Inquiry and Cutitta's Investigation on March 15, 2012. On April 23, 2012, I filed an EEO complaint explaining my unfair treatment, retaliation while in an HWE. ROI page 25. An impartial EEO investigation would not have required me to provide a written statement or verbal testimony without being informed about the voicemail message. An impartial EEO investigation would have required Cutitta to answer questions about the voicemail message and would have interviewed Prystal for failing to act. I provided 44 ← pages of testimony from the ROI pages 84-121, page145, pages 148-152. DHS EEO did not require Prystal or Cutitta to provide ANY testimony throughout the entire ROI regarding unfair treatment, retaliation, HWE, or the SH Investigation. DHS EEO allowed both to obstruct justice and failed to dismiss Mr. Wilson's debacle Inquiry that should have been routed to another DHS component for review. DHS EEO and EEOC AJ overlooked many prohibited personnel practices regarding the IB and SH Inquiry and Investigation. DHS EEO should have invalidated and dismissed the IB and SH Inquiry and Investigation and rule the ROI as being a partial investigation. Cutitta's SH investigation was a well-calculated strategy and conspiracy to find me guilty of IB and SH. Management worked against me to hide unfair treatment, mismanagement of my career, retaliation, forced upon me reassignment to HMD resulting in disability discrimination. ROI page 118. On May 24, 2012, Dr. P and Cutitta de-briefed me on the allegations of IB and SH and denied me a chance to listen to the voicemail message.

IB and SH Inquiry and Investigation; Deeply Tainted. The IB and SH Inquiry and Investigation were deeply tainted as evidence reveals. Dr. P, Prystal, and Cutitta purposely conspired against me to ensure that I was found guilty of IB and SH that led to me being wrongfully reassigned to HMD at St. Elizabeth's construction site. On March 1, 2012, Prystal was aware of my complaints regarding unfair treatment, mismanagement of my career while in an HWE. On March 14, 2012, Dr. P discussed with Quiveors the allegation of SH for two hours. On March 15, 2012, Mr. Wilson informed of Quiveors SH complaint against me. On March 15, 2012, I contacted DHS EEO regarding the false allegations of SH. On March 19, 2012, Mr. Wilson began his Inquiry. On March 27, 2012, Mr. Wilson Inquiry was passed on to Cutitta. On March 28, 2012, Ms. Cutitta began her Investigation and Dr. P and Quiveors collaborated to testify against me regarding SH allegations against me. On April 23, 2012, I contacted DHS EEO and re-submitted my complaint regarding the false allegation of SH. On April 25, 2012, Ms. Cutitta completed her SH Investigation and Dr.P

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and Cutitta Post-Investigation regarding SH began. On May 1, 2012, An EEO Counselor was assigned to my case. Attachment 9. On May 11, 2012, Dr. P and Cutitta Post-Investigation regarding SH was completed. OEJ pages 11-12. On May 15, 2012, DHS EEO issued me the Notice of Rights to File a Discrimination Complaint regarding the false allegation of SH. Attachment 2. On May 24, 2012, Dr. P and Cutitta issued me a Letter of Counseling and Management Directed letter. ROI pages 341-345. On May 25, 2012, completed Individual Complaint of Employment Discrimination. On May 30, 2012, I provided DHS EEO additional discriminating information. Attachment 3. From March 15, 2012 to May 30, 2012, DHS EEO failed to act and this allowed Dr.P, Wilson, and Cutitta to collaborate in tainting the Inquiry and Investigation that found me guilty of IB and SH and had me reassigned to HMD. Mr. Wilson stated clearly; ***"there were several issues at hand, that seemed to cloud the inquiry."*** ROI page 285. Ms. Cutitta refused to allow me the opportunity and listen to a sexual-laced voicemail message for which was used to find me guilty of misconduct and force upon me reassignment to HMD. In December 2012, Management and Dr. P denied me a well-deserved performance bonus due to the tainted Inquiry and Investigation. Attachment 1. Mr. Wilson and Cutitta tainted Inquiry and Investigation never gathered or collected a preponderance of the evidence that proves I had verbally or sexually harassed Quiveors.

Sexism in OCAO and OCHCO. Dr. P was the first-line supervisor for me and Quiveors. From October 18, 2012 to March 14, 2012, Dr. P and Quiveors collaborated in ex parte communication to include favoritism, sexism, and hostility towards me. On October 18, 2011, November 17, 2011, and March 1, 2013, I had raised issues with Dr. P and Prystal regarding mismanagement of my career and hostility from Quiveors, but was forced to remain in the HWE. On March 1, 2016, Dr. P contacted Prystal and reported to her a false allegation of a direct threat made by me in her office. Prystal recommended that Dr. P call DHS Security regarding my statement; "I am a time bomb right now" was a hypothetical statement. Ms. Alfreda Hester, a female Security Clearance Specialist made a bad recommendation. Attachment 4, ROI pages 194-195. On March 13, 2016, supposedly Quiveors' recorded her alleged sexual-laced voicemail message. On March 14, 2012, Dr. P met with Ms. Quiveors in an OCAO conference room and discussed the alleged allegations of IB and SH for two hours. Dr. P contacted and informed Wilson and Cutitta of Quiveors' allegations of IB and SH complaint against me. From March 28, 2012 to May 23, 2012, Dr. P and Cutitta worked against me to ensure that I was guilty of IB and SH. Around April 20, 2012, Cutitta discussed with Dr. P the results from her SH Investigation. On May 24, 2012, Dr. P and Cutitta de-briefed me on the allegations of IB and SH, but refused to allow me an

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opportunity to listen to the supposed voicemail message. From October 18, 2011 to March 1, 2012, I consistently complained and raised issues of mismanagement of my career, retaliation, and hostility from Quiveors while being force to remain in a hostile working environment. Dr. P and Prystal failed to act and neglected to resolve my issues and complaints. From October 18, 2011 to March 13, 2012, Quiveors meticulously built false allegations of IB and SH and fail to inform Dr. P, Wilson, or myself. On March 14, 2012, Dr. P responded quickly regarding Quiveors allegations of IB and SH and Management failed to ask Quiveors as to why she delayed reporting her allegations of IB and SH for more than five months. Dr. P showed favoritism for Quiveors by not removing herself from the IB and SH Inquiry and Investigation. Unfortunately for me, Dr. P refused to support me in any capacity because I had complained that she mismanaged my career, retaliated against me, and condoned a HWE. Prystal and Cutitta were ERS and co-workers at OCHCO. On October 18, 2011, November 17, 2011, and March 1, 2013, I had raised issues with Dr. P and Prystal that involved mismanagement of my career and retaliation while in a HWE. Prystal never provided me any documents about our meeting regarding Dr. P discriminatory actions against me. Prystal discussed my issues with Cutitta, but fail to notify DHS EEO and file a complaint against Dr. P regarding her unfair treatment and prohibited practices against me. On March 28, 2012, Cutitta did not inform me during her SH meeting that she had already discussed the SH allegations with Prystal, Dr. P, and Quiveors. Cutitta did not inform me that she listened to the sexual-laced voicemail message. I ask Cutitta the same question that I had ask Wilson; "***When did Ms. Quiveors feel that she was being sexually harassed and did she report it to anyone immediately***." ROI page 00031. The IB and SH Inquiry and Investigation was biased and I was wrongly found guilty of misconduct. Cutitta refused to answer the question, but coerced me into providing a verbal testimony. EEOC AJ, concurred with all the five DHS females to include Ms. Ross, Dr. P, Quiveors, Prystal, and Cutitta. False testimonies and a bad decision to reassign me to HMD at St. Elizabeth's rather than the NAC resulted in Management having to repay OWCP $30,000 workers' compensation benefits. Attachment 5. The paid benefits confirmed disability discrimination against me.

Reassignment to Headquarters Management Department (HMD). Management failed to provide me the alleged SH voicemail message. ***More probable than not, the alleged SH voicemail message never existed.*** Ms. Cutitta informed Dr. P that I did not want to return to OCAO. ROI page 234. Ms. Cutitta and DHS EEO were not aware that OCAO was comprised of four divisions; (OSEP), (ALM), (OAO/NAC), and (RPM/HMD). A reassignment to OAO/NAC would have eliminated the embarrassment and, hurt while enhancing my career. Ms. Cutitta violated confidentiality regarding her Investigation for which Dr. P should not

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have been informed that I did not want to return to OCAO. Management failed to mention that Ms. Alberta Singletary, was an AS already assigned into the HMD division and that she supported OSEP, OAO/NAC, and RPM/HMD divisions. Management reassigned me from OSEP to RPM/HMD, but fail to realize that Ms. Singletary and I were AS's that performed similar duties and responsibilities. Management denied me the options to rotate and work back and forth from OAO/NAC and RPM/HMD. The options to rotate back and forth were: (1) OAO/NAC 5-days a week, (2) OAO/NAC 3-days a week, (3) RPM/HMD 2-days a week, (4) OAO/NAC 2-days a week, (5) RPM/HMD 3-days a week. Management showed favoritism for Ms. Singletary by allowing her to rotate and work back and forth between OAO/NAC and OSEP/ALM allowed her to maintain 100 percent of her duties and responsibilities. Management reassigned me to RPM/HMD at St. Elizabeth's and this decreased my duties and responsibilities by 80 percent. I was directed to sort through more than ten years of records files that long served its purpose and was ready for destruction in a dusty Network server/ storage room. I was directed to rinse and wipe down golf carts outside in heat ranging from 85 to 95 degrees in August 2012 exacerbated my reactive airway disease. Around August 3, 2012, I started becoming ill shortly after reporting to St. Elizabeth's construction site as confirmed by EEO testimonies from Cutitta, Ms. Gloria Eskridge, former Department Head and Ms. Kathy Lane. Attachment 6. On August 29, 2012, I suffered a potential asthma/bronchial attack. ROI page 104 #58, Attachment 7. From August 29, 2012 to the present date, the AS job position remains vacant. My 24 years of naval service, three years of government contractor experience, and a Masters' degree in Business Administration was expended carelessly. Management ignored my doctor recommendations to remove me from St. Elizabeth's. On September 3, 2012 and September 6, 2012, my Veterans Affairs doctor recommended that I should be removed from St. Elizabeth's due to my respiratory; reactive airway disease. ROI page 104, Attachment 7. On November 19, 2012, I submitted a CA-2 request for workers' compensation benefits. On December 12, 2012, OWCP accepted my CA-2 claim for benefits. On January 9, 2013, OWCP approved my CA-2 claim for benefits. In April 2013, OWCP paid me almost $30,000 in compensation benefits. Management denied me a detail that could have enhanced my career development, provided more training opportunities, and could have prevented my reactive airway disease from being exacerbated. Management forced upon me reassignment to HMD at St. Elizabeth's, a dusty working environment, thus violating my Title VII Civil Rights; American Disability Act, Rehabilitation Act, and 5 USC 8151; Civil Restoration Rights. Dr. P was involved and ultimately responsible for sabotaging the IB and SH Inquiry and Investigation while collaborating and corroborating in prohibited personnel practices to mismanaged my career and denied me a performance bonus, detail, and training

Attachment (4)

opportunities, and failed in providing me an updated PD and SF-50. Dr. P forced me to remain in an HWE and this resulted in Quiveors filing a false allegation of IB and SH complaint against me. Management denied me a performance bonus by citing a conduct issue known to all as SH and did not provide an updated PD, SF-50, or a Transition/Job Questionnaire before reassigning me to RPM/HMD. OPM requires that government agencies provide employees an updated PD and SF-50 when reassigned to a new job location, especially a construction site. St. Elizabeth's required safety equipment; helmet, boots, and a safety vest. The PD and SF-50 would have explained my duties, responsibilities, safety and health risks. Dr. P did not provide me the PD and SF-50 and this prevented me from appealing the reassignment to RPM/HMD. Dr. P was not concerned about my career development, reassignment, safety and health risks. ROI pages 126, 270-271. Letter of Counseling was biased due to a partial SH Inquiry and Investigation that should have been disqualified. ROI pages 341-343. Management Directed Letter did not mention the Re-Organization Structure, nor mentioned that my AS job position was being eliminated. Dr. P and Cutitta manipulated and coerced me into signing the Management Directed letter while under duress. My reactive airway disease was exacerbated resulting in OWCP paying me $30,000 in workers' compensation benefits and Management was required to repay OWCP. Denying me a PD, SF-50, and forcing reassignment to RPM/HMD exacerbated my reactive airway disease resulted in disability discrimination. On May 15, 2012, DHS EEO issued me the Notice of Rights to File a Discrimination Complaint regarding the false allegation of SH. Attachment 2. On April 23, 2012, DHS EEO neglected to acknowledge my complaints and failed to dismiss the tainted IB and SH Inquiry and Investigation. DHS EEO and EEOC fail to connect all the discriminating factors and prohibited personnel practices against me. Before May 24, 2012, DHS EEO failed to halt Dr. P and Cutitta from issuing me a Letter of Counseling Management Directed letter. ROI pages 341-345. There was no preponderance of evidence to substantiate false allegations against me. Mr. Wilson Inquiry and Cutitta SH Investigation was a debacle that defamed my character and slandered my reputation. I have proven that discriminatory animus was the motive for Dr. P and Cutitta, and Quiveors to find me guilty of misconduct. Since March 2012, DHS EEO was heavily involved, but failed to focus more attention on Wilson, Dr. P, and Cutitta based on its partial Report of Investigation that negatively impacted the outcome of my case. I request that my appeal is accepted and grant me a status conference or hearing.

Respectfully submitted,

Steven H. Hall

STEVEN H. HALL

Attachment (4)

CERTIFICATE OF SERVICE

I certify that the attached appeal and documents were faxed and mailed to Agency and EEOC Office of Federal Operations as follows:

Agency Representatives
Ms. Kimble Garrett and Mary K. Monahan
Department of Homeland Security
245 Murray Lane, SW
Mail Stop 0485
Washington, DC 20528
Facsimile (202) 447-3111

EEOC Washington Field Office
U.S. Equal Employment Opportunity Commission
Washington Field Office,
Office of Federal Operations
131 M Street, NE, Suite 5SW12G
Washington, DC 20507
Facsimile (202) 663-7022

October 27, 2016
(Date)

S. H. Hall
STEVEN H. HALL
Complainant

Attachment (4)

UNITED STATES AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE

STEVEN H. HALL,
Complainant,

v.

Appeal No. 0120140975
Hearing No. 570-2013-00245X
Agency No. HS-HQ- 22253-2012

JEH JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY,
Agency.

DATE: October 28, 2016

APPEALING EEOC DECISION; ADDITIONAL CLARIFICATION

I am providing additional clarification regarding Dr. P discriminatory actions against me. Dr. P six ulterior motive to find me guilty of IB and SH regarding the Inquiry and Investigation as follows: (1) Dr. P was the first-line supervisor for Quiveors and me. On March 14, 2012, Quiveors contacted Dr. P to inform her of IB and SH allegations against me for two hours, and this was favoritism and a conflict of interest. (2) On March 28, 2012, Dr. P and Quiveors mutually agreed from their March 14, 2012 discussion by testifying against me to Cutitta during the SH Investigation meeting. (3) On May 24, 2012, Dr. P and Cutitta issued me a Letter of Counseling and Management Directed letter and both were aware that this was favoritism for Quiveors and a conflict of interest. (4) Dr. P discriminatory actions against me was a setup for retaliation for which I was forced to remain in an HWE. Dr. P diverted the attention from herself to avoid being disciplined by OCAO leadership. (5) Dr. P

Attachment (4)

fail to separate her personal relationship from her job; duties and responsibilities and this prompted her to speak to me in a demeaning and impatient tone of voice. Read Claim #5, ROI 101-102. From September 5, 2012 to November 18, 2013, Management neglected recommendations from (1) Dr. Nayda, Veterans Affairs doctor recommended to remove me from offending agent (dust), (2) Dr. Bonavente, Family doctor recommended transfer to a less dusty location from HMD at St. Elizabeth's construction site. See Attachment (7) pages 3-5. On November 28, 2015, I terminated the services of Rosemary Dettling, and it is requested that Ms. Dettling is not contacted in any capacity regarding any EEOC cases.

Respectfully submitted,

S. H. Hall

STEVEN H. HALL

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October 28, 2016
(Date)

STEVEN H. HALL
Complainant

Attachment (4)